DOCKET

No. 86-1650-CFX
Status: GRANTED

Title: Trans World Airlines, Inc., Petitioner
v.
Independent Federation of Flight Attendants

Docketed:
April 14, 1987

Court: United States Court of Appeals
for the Eighth Circuit

See also:
87-548

Counsel for petitioner: Gartner,Murray

Counsel for respondent: Fehr,Steven

Entry	Date	Note	Proceedings and Orders
1	Apr 14 1987	G	Petition for writ of certiorari filed.
2	May 15 1987		Brief of respondent in opposition filed.
3	May 19 1987		DISTRIBUTED. June 4, 1987
4	Jun 1 1987	X	Reply brief of petitioner TWA, Inc. filed.
5	Jun 8 1987		Petition GRANTED.
			**********
7	Jul 15 1987		Order extending time to file brief of petitioner on the merits until August 13, 1987.
8	Aug 11 1987		Record filed.
9	Aug 12 1987		Joint appendix filed.
10	Aug 12 1987		Brief of petitioner TWA, Inc. filed.
11	Aug 13 1987	G	Motion of Crossover Flight Attendants for leave to file a brief as amicus curiae filed.
12	Aug 13 1987	G	Motion of Some Working TWA Flight Attendants for leave to file a brief as amicus curiae filed.
14	Aug 19 1987		Order extending time to file brief of respondent on the merits until October 5, 1987.
17	Sep 5 1987		Brief of respondent Independent Federation of Flight Attendants filed.
15	Sep 21 1987		Motion of Crossover Flight Attendants for leave to file a brief as amicus curiae GRANTED.
16	Sep 21 1987		Motion of Some Working TWA Flight Attendants for leave to file a brief as amicus curiae GRANTED.
18	Oct 5 1987	G	Motion of American Federation of Labor and Congress of Industrial Organizations, et al. for leave to file a brief as amici curiae filed.
19	Oct 19 1987		Motion of American Federation of Labor and Congress of Industrial Organizations, et al. for leave to file a brief as amici curiae GRANTED.
20	Nov 20 1987		CIRCULATED.
21	Nov 23 1987		SET FOR ARGUMENT. Tuesday, January 12, 1988. (3rd case).
22	Dec 21 1987	X	Reply brief of petitioner TWA, Inc. filed.
23	Jan 12 1988		ARGUED.

PETITION FOR WRIT OF CERTIORARI

86 1650

Supreme Court, U.S.
FILED
APR 14 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1986

TRANS WORLD AIRLINES, INC.,

Petitioner,

v.

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MURRAY GARTNER
PROSKAUER ROSE GOETZ & MENDELSOHN
300 Park Avenue
New York, New York 10022
(212) 909-7000

Counsel of Record for Petitioner

PAUL E. DONNELLY
STINSON MAG & FIZZELL
P.O. Box 19251
Kansas City, Missouri 64105

MARK A. BUCKSTEIN
MICHAEL A. KATZ
605 Third Avenue
New York, New York 10158

Attorneys for Petitioner

Of Counsel

Carole O'Blenes
Kevin Chapman

QUESTION PRESENTED

After the stated term of a collective bargaining agreement, and after the parties have been released by the National Mediation Board to engage in self-help, does the Railway Labor Act (unlike the National Labor Relations Act) mandate that the carrier enforce the union security provisions of that agreement so as to compel the carrier's employees (almost all strike replacements and others who have resigned union membership) to pay union dues as a condition of their continued employment?

PARTIES

The petitioner is Trans World Airlines, Inc. ("TWA"), a "common carrier by air" within the meaning of Title II of the Railway Labor Act. TWA has no parent company, and no affiliates or subsidiaries other than wholly owned subsidiaries.

Respondent, The Independent Federation of Flight Attendants ("IFFA"), is an unincorporated labor organization designated as the bargaining representative under the Railway Labor Act of TWA employees in the flight attendant craft or class.

Glenda Lopez-Bruner, Louis Dantuano, Kerry Zesiger, June Shaw, Nancy King and Georgia Debever, representatives of that class of TWA flight attendants who resigned their membership in IFFA and crossed IFFA picket lines to continue or resume working for TWA during a strike by IFFA against TWA, were granted leave to intervene below for the purpose of appearing and arguing with respect to the August 26, 1986 order of the Court of Appeals partially staying the order of the district court.

TABLE OF CONTENTS

PAGE

Opinions Below 1

Jurisdiction 2

Statutes Involved 2

Statement of the Case 2

Reasons for Granting the Writ 9

I. The RLA (Like The NLRA) Neither Requires Nor Permits Compulsory Union Membership As A Condition Of Employment Beyond The Stated Term Of (And Status Quo Period For) The Collective Agreement By Virtue Of Which That Compulsion Was Lawful 11

II. The Decision Below—In Direct Conflict With The Holding And Rationale Of The Ninth Circuit In *Reeve Aleutian*, And At Odds With Decisions Of The First, Second And Seventh Circuits—Demonstrates A Compelling Need For Guidance From This Court Concerning The Proper Application Of Its Decision In *Florida East Coast Railway* 16

III. Review Should Be Granted To Dispel The Uncertainty And Instability Engendered By The Decision Below Throughout The Airline Industry. 26

Conclusion 28

Appendix A

Opinion and Judgment of the U.S. Court of Appeals for the Eighth Circuit 1a

PAGE

Appendix B

Orders of the U.S. Court of Appeals for the Eighth Circuit 19a

Appendix C

Memorandum and Orders of the U.S. District Court for the Western District of Missouri 30a

Appendix D

Text of Statutes Involved 44a

Appendix E

Excerpts from the 1981-84 Collective Bargaining Agreement Between TWA and IFFA 55a

Appendix F

Complaint for Declaratory Judgment, filed April 25, 1986 ..... 82a

Defendant's Answer to Complaint for Declaratory Judgment and Counterclaim, filed June 3, 1986.. 102a

Plaintiff's Answer to Counterclaim for Declaratory Judgment, filed June 24, 1986 ..... 109a

Appendix G

Excerpts from Stipulations in Civil Action No. 86-6084, CV-SJ-6, filed July 21, 1986 ..... 111a

TABLE OF AUTHORITIES

Cases PAGE

AFTRA v. *NLRB*, 395 F.2d 622 (D.C. Cir. 1968) 15

ALPA v. *Pan American World Airways*, 765 F.2d 377 (2d Cir. 1985) 21

ALPA v. *United Air Lines*, 802 F.2d 886 (7th Cir. 1986) 16, 19, 23, 27

Anheuser-Busch, Inc. v. *Teamsters, Local 822*, 584 F.2d 41 (4th Cir. 1978) 14

Bethlehem Steel Co., 136 N.L.R.B. 1500 (1962), *aff'd in pertinent part*, 320 F.2d 615 (3d Cir. 1963), *cert. denied*, 375 U.S. 984 (1964) 14

Brotherhood of Railway & Steamship Clerks v. *Florida East Coast Railway*, 384 U.S. 238 (1966) ..... *passim*

Brotherhood of Railroad Trainmen v. *Jacksonville Terminal Co.*, 394 U.S. 369 (1969).....13, 16

Carpenter Sprinkler Co. v. *NLRB*, 605 F.2d 60 (2d Cir. 1979)..... 15

Communications Workers of America v. *NLRB*, 215 F.2d 835 (2d Cir. 1954) 14

EEOC v. *United Air Lines*, 755 F.2d 94 (7th Cir. 1985) 17, 19, 23

Ellis v. *Railway Clerks*, 466 U.S. 435 (1984) 12

Flight Engineers International Ass'n v. *Eastern Air Lines*, 359 F.2d 303 (2d Cir. 1966) 16, 21, 27

Hudson Chemical Co., 258 N.L.R.B. 152 (1981) 14

IAM v. *Aloha Airlines*, 776 F.2d 812 (9th Cir. 1985) ...22, 27

IAM v. *Northeast Airlines*, 536 F.2d 975 (1st Cir.), *cert. denied*, 429 U.S. 961 (1976).....19, 23

PAGE

IAM v. *Qantas Airways*, 122 L.R.R.M. 2263 (N.D. Cal. 1985)..... 22

IAM v. *Reeve Aleutian Airways*, 330 F. Supp. 332 (D. Alaska 1971), *aff'd*, 469 F.2d 990 (9th Cir. 1972), *cert. denied*, 411 U.S. 982 (1973)..... *passim*

IAM v. *Street*, 367 U.S. 740 (1961) 12

Manning v. *American Airlines*, 329 F.2d 32 (2d Cir.), *cert. denied*, 379 U.S. 817 (1964).....13, 16, 21, 27

NLRB v. *Haberman Construction Co.*, 618 F.2d 288 (5th Cir. 1980), *modified on other grounds on reh'g en banc*, 641 F.2d 351 (5th Cir. Apr. 1981).....14, 15

NLRB v. *United Auto Workers*, 194 F.2d 698 (7th Cir. 1952)..... 14

NLRB v. *United Auto Workers*, 297 F.2d 272 (1st Cir. 1961)..... 14

Peerless Roofing Co., 247 N.L.R.B. 500 (1980), *enforced*, 641 F.2d 734 (9th Cir. 1981)..... 14

Railway Employes' Dep't v. *Hanson*, 351 U.S. 225 (1956) 12

Robbins Door & Sash Co., 260 N.L.R.B. 659 (1982)... 14

S. Freedman Electric Co., 256 N.L.R.B. 432 (1981).... 14

Southwestern Steel & Supply, Inc. v. *NLRB*, 806 F.2d 1111 (D.C. Cir. 1986) 14

Trans International Airlines v. *IBT*, 650 F.2d 949 (9th Cir. 1980), *cert. denied*, 449 U.S. 1110 (1981) 8

Western Airlines v. *IBT*, 55 U.S.L.W. 3676 (U.S. Apr. 2, 1987)..... 8

PAGE

Statutes

28 U.S.C. § 1254(1) 2
28 U.S.C. § 1331 7
28 U.S.C. § 1337 7
28 U.S.C. § 2201 7
National Labor Relations Act
Section 8(a)(3), 29 U.S.C. § 158(a)(3) 11, 13
Railway Labor Act
Section 2, First, 45 U.S.C. § 152, First 25
Section 2, Fourth, 45 U.S.C. § 152, Fourth ..10, 11, 12, 13
Section 2, Fifth, 45 U.S.C. § 152, Fifth 11, 12
Section 2, Seventh, 45 U.S.C. § 152, Seventh 18
Section 2, Eleventh, 45 U.S.C. § 152, Eleventh..... *passim*
Section 5, 45 U.S.C. § 155..... 5, 13
Section 6, 45 U.S.C. § 156..... *passim*

Other Authorities

Burgoon, *Mediation Under the Railway Labor Act*, National Mediation Board, *The Railway Labor Act at Fifty*, 72 (U.S.G.P.O. 1976) 18, 27

Senate Subcommitte on Labor of the Comm. on Labor and Public Welfare, 93d Cong., 2d Sess., *Legislative History of the Railway Labor Act, as Amended (1926 through 1966)* (1974) 12

IN THE

Supreme Court of the United States

OCTOBER TERM 1986

No.

TRANS WORLD AIRLINES, INC.,

Petitioner,

v.

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner Trans World Airlines, Inc. ("TWA") respectfully prays that a writ of certiorari issue to review the judgment of the U.S. Court of Appeals for the Eighth Circuit entered on January 14, 1987.

OPINIONS BELOW

The opinion and judgment of the U.S. Court of Appeals for the Eighth Circuit, reported at 809 F.2d 483, 124 L.R.R.M. 2364, are reprinted as Appendix A hereto. They affirm a memorandum and order of the U.S. District Court for the Western District of Missouri, reported at 640 F. Supp. 1108, 123 L.R.R.M. 2077, which is reprinted as Appendix C hereto.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Eighth Circuit was entered on January 14, 1987. This petition is filed within ninety (90) days of that date. The jurisdiction of this Court to review the judgment on petition for certiorari rests upon 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant provisions of the Railway Labor Act ("RLA" or "the Act"), as amended, (45 U.S.C. §§ 151 *et seq.*) and of the National Labor Relations Act ("NLRA"), as amended, (29 U.S.C. §§ 151 *et seq.*) are reprinted as Appendix D hereto.

STATEMENT OF THE CASE

The decision below attributes to the Railway Labor Act the startling requirement that strike replacements must pay dues to the union whose strike they opposed, although the union never reached a new agreement with the carrier, and is actively pursuing litigation designed to remove the dues-payers from their jobs.

Trans World Airlines, Inc. ("TWA") and the Independent Federation of Flight Attendants ("IFFA" or "the Union") were parties to a collective bargaining agreement with a stated term from August 1, 1981 to July 31, 1984 ("1981-84 agreement"). Negotiations for a new agreement began in March 1984 and proceeded through the steps required by the RLA, including direct negotiation, mediation and the final 30-day cooling off period, without success. On March 7, 1986, approximately two years after the negotiations began, IFFA called a strike against TWA. TWA has operated since the strike with permanent strike replacements and with flight attendants employed before the strike began who crossed IFFA picket lines in order to work.

In April, IFFA asserted that the working flight attendants were subject to the union security provisions of the old agreement, *i.e.*, that they must become members of the Union and maintain that membership, at least to the extent of paying initiation fees and monthly dues to the Union, or lose their jobs. TWA sought a declaratory judgment that it had no obligation to enforce the union membership or dues check-off provisions of the 1981-84 agreement against working flight attendants for the benefit of the Union. On May 17, 1986, when IFFA offered on behalf of the striking flight attendants to return to work although no new agreement had been reached, there were less than 200 vacancies to be filled in the total work force of 4,200.

The court below held that "the national labor policy enunciated by the Railway Labor Act" (5a)[1] requires TWA to compel over 4,000 flight attendants (nearly all of whom chose to work during the strike) to pay involuntary dues to IFFA, as a condition of their continued employment, even though there is no successor collective agreement. The court also held that TWA must continue to check-off those dues, and so assist IFFA in their collection—while IFFA is free to strike, picket, boycott and engage in other self-help in support of its bargaining demands and, indeed, to seek the termination of employment of the very persons required to pay dues.[2]

---

1 The pages of the Appendices to this petition are referred to as "__ a."

2 On March 5, 1986, IFFA filed an action (No. 86-6030-CV-SJ-6) in the U.S. District Court for the Western District of Missouri, alleging violations by TWA of the Railway Labor Act, including a failure to exert every reasonable effort to make a new agreement. That action is currently being tried before Judge Howard F. Sachs, who has ruled that he will consider in each action pending before him relevant facts established in the related actions. Claiming that its strike was caused and/or prolonged by carrier violations of the RLA, IFFA seeks, *inter alia*, a return to the status quo conditions in effect on and before March 6, 1986, the reinstatement of all full-term strikers, and the displacement of the strike replacements who are, pursuant to the district court order in this action, presently being required to pay compulsory dues to IFFA as a condition of their employment.

(footnote continued)

The Controlling Facts

The 1981-84 agreement between TWA and IFFA was by its terms effective from August 1, 1981 until July 31, 1984 and subject to renewal thereafter for annual periods "unless written notice of intended change [was] served in accordance with Section 6 . . . of the Railway Labor Act . . . by either party . . . at least 90 days prior to the renewal date . . . ." (78a)

As authorized by RLA Section 2, Eleventh (45 U.S.C. § 152, Eleventh), which states that a carrier and a union "shall be permitted . . . to make [such] agreements," the 1981-84 agreement contained compulsory union membership and dues check-off provisions. Under Article 24, each employee in a classification covered by the agreement was, as a condition of continued employment, required to pay initiation fees and monthly dues to IFFA. (66-67a)

Article 24 also obligated TWA, "[d]uring the life of [the] Agreement," to deduct the compulsory fees and dues from the pay of covered employees, provided that the employee voluntarily executed an "assignment and authorization for check-off of initiation fees and union dues." (72-73a) As required by RLA Section 2, Eleventh, each dues check-off authorization was to be revocable "after the expiration of one (1) year from [its execution], or upon the termination date of the applicable collective bargaining agreement . . . whichever occurs sooner." (73a)[3]

In another action, summary judgment on one count of which is currently before the Eighth Circuit on cross-appeals (Nos. 86-2197 and 2319), IFFA seeks the reinstatement of full-term strikers (and the displacement of strike replacements) on other theories, assuming that IFFA's strike was an economic one, neither caused nor prolonged by violations of the RLA. The stipulations attached to this petition as Appendix G were filed in that action, and were before the district court and the Court of Appeals when the decisions in this case were issued.

3 The dues check-off authorization form tracked the language of Section 2, Eleventh, which states that a written assignment of membership dues to a labor organization "shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner." *Compare* 45 U.S.C. § 152, Eleventh (b) *with* 73a.

On February 29, 1984, in accordance with Article 28 of the agreement, and RLA Section 6 (45 U.S.C. § 156), TWA served on IFFA a notice of intended change, thereby preventing automatic renewal of the 1981-84 agreement.[4] On April 27, 1984, IFFA served on TWA its notice of intended change. Neither party proposed that a new agreement, if and when reached, contain union membership provisions different from those contained in Article 24 (A-L) of the 1981-84 agreement. (88a)

Negotiations continued, through the processes of the Railway Labor Act and under the auspices of the National Mediation Board ("NMB"), for nearly two years. Throughout that period, and after the 1981-84 agreement expired by its terms on July 31, 1984, both parties were required by RLA Section 6, to maintain in effect the "rates of pay, rules or working conditions" that existed when the notices of intended change were served, including the union membership requirement and the dues check-off procedure. 45 U.S.C. § 156.

On February 4, 1986, no new agreement having been reached, the NMB released the parties from mediation, and notified them that the 30-day "cooling off" period mandated by RLA Section 5, First had begun. (89a) At the end of that period, IFFA began a strike; TWA then put into effect new rates of pay and work rules. (90a) On March 7, 1986, in order to continue operating, TWA began hiring permanent replacements for the striking flight attendants. During the course of the strike, some 2,800 new flight attendants were hired as permanent strike replacements, and about 1,280 pre-March 7 flight attendants abandoned the strike and crossed IFFA picket lines to return to work (or never joined the strike). (113-14a)

---

4 The full text of the duration clause in Article 28 (entitled "Duration of Agreement") is:

> Except as otherwise specified in this Agreement, this entire Agreement shall be effective August 1, 1981 [and] shall remain in effect until July 31, 1984, and thereafter shall renew itself without change for yearly periods unless written notice of intended change is served in accordance with Section 6, Title I of the Railway Labor Act, as amended, by either party hereto, at least 90 days prior to the renewal date in each year. (78a)

Commencement of This Action

On April 11, 1986, when IFFA had been on strike for over a month and no new agreement had been reached, IFFA asserted that Article 24 of the 1981-84 agreement remained in effect and was enforceable against flight attendants working during the strike. (96-98a) By letter dated April 25, 1986, TWA informed IFFA that it had no remaining contractual or statutory obligation to enforce Article 24 of the expired agreement against its employees for the benefit of IFFA. That letter stated, *inter alia*:

> It is contrary to all reason to suggest that an expired agreement requires flight attendants, as a condition of their continued employment by TWA, to pay dues to support IFFA's strike, although they have chosen to work. IFFA's position, in other words, appears to be that a flight attendant who is now working, in order to keep working, must pay dues to the union which is trying to persuade that flight attendant to stop working. (100a)

On the same day, TWA filed this action.

In June 1986, TWA moved and IFFA cross-moved for summary judgment. At the time of the cross-motions, TWA's workforce included approximately 4,200 flight attendants: some 2,800 new flight attendants hired as permanent replacements during the strike; approximately 1,200 pre-March 7 flight attendants who never joined the strike or who abandoned it to cross IFFA picket lines and return to work; and about 200 "full-term strikers" rehired after the end of the strike. (113-15a) IFFA contended that all these employees must pay union dues or lose their jobs, although no new agreement containing a union membership requirement or dues check-off procedure has been made.

The District Court Decision

The district court granted summary judgment in favor of IFFA.[5] It relied principally on language from this Court's opinion in *Brotherhood of Railway & Steamship Clerks* v. *Florida East Coast Railway*, 384 U.S. 238 (1966) ("*FEC*")—although acknowledging that *FEC* "may well" have been "premised on an assumption of an underlying, existing contract" (36a), rather than an agreement whose stated term had lapsed.

Characterizing the questions presented as "sufficiently difficult . . . to justify reasoning in the alternative" (31a), the district court first concluded that the Railway Labor Act does not permit a collective bargaining agreement for a fixed term. In the court's view, therefore, TWA's obligation to enforce the union membership requirement survived beyond the statutory status quo period and into the self-help period, even assuming that the parties had agreed that the requirement would expire on July 31, 1984. The court expressly declined to follow the Ninth Circuit holding directly to the contrary. *See International Association of Machinists* v. *Reeve Aleutian Airways*, 469 F.2d 990 (9th Cir. 1972), *cert. denied*, 411 U.S. 982 (1973).

Alternatively, and with only slightly shifted emphasis, the district court read the duration provision of the 1981-84 agreement "harmoniously with the Act so as to create continuing obligations [beyond its stated term], except as changed in accordance with § 6 or with supplemental agreements refining the prescribed procedures." (40a) So viewed, it concluded, "partial renewal" of all terms of the agreement not referred to in the Section 6 notices "seem[ed] implied." (40a) Consequently, according to the court, the union membership and dues check-off provisions remained in effect as part of what it described as a "mutilated collective bargaining agreement." (39a, n.8)

---

5 The jurisdiction of the district court was invoked pursuant to 45 U.S.C. §§ 151 *et seq.*, and 28 U.S.C. §§ 1331 and 1337. The court had jurisdiction under 28 U.S.C. § 2201 to grant the declaratory relief requested.

The Court of Appeals Decision

The Court of Appeals, also relying principally on language from this Court's opinion in *FEC*, affirmed. It too declined to follow the holding or rationale of *IAM* v. *Reeve Aleutian Airways*, *supra*, where the Ninth Circuit held that union membership and dues check-off provisions (even if not the subject of a Section 6 notice) do not survive into the self-help period.

The Eighth Circuit declared it "unnecessary to address whether or not the RLA permits agreements of fixed duration." (18a, n.5) Echoing the district court's concept of "partial" renewal, however, and in the face of contrary readings by other Circuits, it concluded that

> [t]he contract in question is amendable in accordance with its provisions and the Railway Labor Act. It does not wholly terminate, either automatically or upon service of notice of a limited number of intended changes. The union security provision continues in effect, * * *. (14-15a)

This construction of the duration clause did not flow from a reading of the language agreed to by the parties, findings as to their intent in adopting it, or custom and practice in the airline industry.[6] Rather, it resulted from the court's view that "the underlying statute . . . *requires* a construction which emphasizes continuity in existing relationships between management and labor, except where either side has requested a change"

6 Such considerations would be appropriate in a System Board of Adjustment proceeding which would be necessary if the meaning of the duration clause were thought to be sufficiently ambiguous to require construction, since interpretation of contract language under the RLA presents a "minor dispute" not within the jurisdiction of the courts. *See Western Airlines* v. *IBT*, 55 U.S.L.W. 3676 (U.S. Apr. 2, 1987). TWA moved for summary judgment in this case on the premise that the duration clause clearly provided for contract termination on service of a Section 6 notice, as established by all applicable Courts of Appeals decisions; and arbitration, as a minor dispute, to establish its meaning is unnecessary because it is not ambiguous. (*See Trans International Airlines* v. *IBT*, 650 F.2d 949, 964 (9th Cir. 1980), *cert. denied*, 449 U.S. 1110 (1981); and n.15, *infra*.)

and that "the core language of *FEC* . . . *requires* stable and continuing agreements between management and labor." (15a, 12a; emphasis added) Thus, although eschewing reliance on the district court's holding that an agreement for a fixed term is "unlawful under the RLA" (5a), the Court of Appeals reached the same result through an unprecedented construction of the unambiguous duration clause of the 1981-84 agreement.

The court below thus found a dichotomy in national labor policy as it relates to union security clauses. It acknowledged that, under the NLRA, "union security provisions do not survive expiration of a contract even though provisions governing terms and conditions of employment generally do survive expiration of an agreement and may not be changed until the parties have bargained to impasse." (16a) It held, however, that, under the RLA, union security provisions do survive. The court made no mention of the legislative history of Section 2, Eleventh (see pp. 12-14, *infra*), which demonstrates beyond question that Congress intended rights as to union security provisions to be the same under the RLA as under the NLRA.[7]

REASONS FOR GRANTING THE WRIT

The decision below is of "major import to labor relations in the airline industry" (31a) and to the maintenance of a consistent national labor policy applicable to all industries. If its unprecedented result is allowed to stand, it will (i) put the RLA squarely in opposition to the NLRA in respect of union security clauses, although Congress clearly intended the same national labor policy on that subject to apply to both Acts, and (ii) inject a new and

7 The Court of Appeals emphasized that a union membership requirement is an "extremely important condition." (18a) "Clearly," it said, "if the Union is to represent the flight attendants, it needs to collect dues, and enforcement of the check-off provision is integral to that process." (17a) The anomaly of compelling the strike replacements to pay involuntary dues to finance IFFA's efforts to displace them was not addressed. Previously, however, when the court below partially stayed the district court's order (20-21a), it had seemed to acknowledge that it was questionable to compel the working flight attendants to support the Union. That stay was vacated by a majority of a different panel on October 15, 1986. (26-27a)

volatile subject into the collective bargaining process that will surely increase labor strife in the airline industry (*i.e.*, the potential need to propose the elimination of union security clauses in each contract negotiation).

The present decision is predicated on a misapplication of this Court's decision in *FEC*; it is in direct conflict with the decision of the Ninth Circuit in *IAM* v. *Reeve Aleutian Airways*; and it is contrary to decisions of the First, Second and Seventh Circuits dealing with fixed term contracts. The court's fundamental misconceptions about the framework for collective bargaining established by the RLA, moreover, will distort the carefully balanced scheme of freedom and compulsion embodied in the Act and will engender unnecessary disputes, thereby undermining the bargaining process and destabilizing labor relations throughout the airline industry.

The court below said nothing about "the general policies of the RLA" (16a) that justifies its disregard of the specific policies embodied in RLA Section 2, Eleventh.[8] The insupportable consequence of its decision is judicial sanction of compulsory union membership, as a condition of employment, in violation of Section 2, Fourth and Eleventh. It also has an anomalous, and equally insupportable, result: it permits a union, during a labor dispute that has reached the stage of Congressionally-sanctioned economic struggle,

---

8 The question here is not whether the RLA generally freezes, beyond the status quo period, working conditions embodied in a prior agreement and not the subject of a Section 6 notice. It is whether the Union may lawfully require TWA to force its employees to support the Union while TWA has no new agreement with the Union and, therefore, neither TWA nor its employees enjoy the labor peace and stability that Congress clearly envisioned as the *quid pro quo* for union security requirements. That question stands apart from the question of what supplemental bargaining obligation, after the end of the status quo period, TWA may have had as to other provisions of the 1981-84 agreement that it did not propose to change.

Judging from its comments and speculation about the " 'parade of horrors' " that might flow from acceptance of TWA's position (16-18a), the court below seems to have lost sight of this fact. Rather, the court appears to have believed it necessary to enunciate a "rule" applicable to *all* conditions of employment, without regard to the unique nature of union security requirements or the special treatment afforded them by Congress.

to continue without restriction the exercise of self-help in an attempt to achieve its bargaining objectives, while denying the carrier its right to exercise the most modest form of peaceful self-help—refusal to assist the union in securing economic support for the union's self-help efforts.

Consistent national labor policy requires that, unless and until a new integrated agreement is reached and labor peace prevails, a union may collect dues only on a voluntary basis and without the assistance of dues check-off and the threat of discharge. Indeed, as the Ninth Circuit correctly concluded under the RLA over a decade ago, and as the National Labor Relations Board and the courts have uniformly concluded under the NLRA, that is what both the RLA and the NLRA mandate. The court below, holding to the contrary, flouted the clear Congressional intent expressed in RLA Section 2, Fourth and Eleventh.

Review by this Court is, therefore, essential in order to preserve the integrity of the Act and to secure its uniform judicial administration. Review is, moreover, necessary to resolve the divergent understandings among the Circuits of this Court's decision in *FEC* and to make clear that *FEC* does not require the continuation of union security provisions contained in an agreement for a stated term, after the expiration of the status quo period.

I. THE RLA (LIKE THE NLRA) NEITHER REQUIRES NOR PERMITS COMPULSORY UNION MEMBERSHIP AS A CONDITION OF EMPLOYMENT, BEYOND THE STATED TERM OF (AND STATUS QUO PERIOD FOR) THE COLLECTIVE AGREEMENT BY VIRTUE OF WHICH THAT COMPULSION WAS LAWFUL.

No aspect of national labor policy has received more careful treatment by Congress and the courts than union membership requirements. This is so, in large part, because the compulsory payment of union dues is an interference with otherwise protected employee rights to refrain from engaging in concerted activity (RLA § 2, Fourth and Fifth; NLRA § 8(a)(3))

and, at least under the RLA, is "a significant impingement on First Amendment rights" (*Ellis* v. *Railway Clerks*, 466 U.S. 435, 455 (1984)). Nonetheless, Congress has permitted (and the courts have upheld) such interference—but only in conjunction with the voluntary collective bargaining agreement that it is national labor policy to encourage.

As this Court has stated,

> [t]he union shop provision of the Railway Labor Act is only permissive. Congress has not compelled nor required carriers and employees to enter into union shop agreements. *Railway Employes' Dep't* v. *Hanson*, 351 U.S. 225, 231 (1956).

Those permissive union shop provisions were enacted by Section 2, Eleventh, which is "substantially the same" as the NLRA provisions. It was added to the RLA in 1951 in order "to extend to employees and employers subject to the Railway Labor Act rights now possessed by employees and employers under the Taft-Hartley Act in industry generally." Senate Subcomm. on Labor of the Comm. on Labor and Public Welfare, 93d Cong., 2d Sess., *Legislative History of the Railway Labor Act, as Amended (1926 through 1966)*, at 1090, 1106-07, 1120 (1974).[9]

Subject to certain statutory conditions, RLA Section 2, Eleventh permits a carrier and a union to make an "agreement" requiring that all employees shall become members of the union that represents them. It also permits "agreements" providing for dues check-off, but only upon written authorization by the employee—which must be revocable no later than

---

9 Before 1951, RLA Section 2, Fourth made it unqualifiedly unlawful for a carrier to "influence or coerce employees in an effort to induce them to join or remain members of any labor organizations," to check off union dues or assessments, or otherwise to assist a union in the collection of dues. RLA Section 2, Fifth expressly prohibited individual agreements with employees requiring them to join (or not to join) a union. *IAM* v. *Street*, 367 U.S. 740, 750-51 (1961).

The Act was amended to relieve unions of the burden of " 'free riders'—those employees who obtained the benefits of the unions' participation in the machinery of the Act without financially supporting the unions." *Id.* at 761.

"the termination date of the applicable collective agreement." (45 U.S.C. § 2, Eleventh (b))

Plainly, Congress contemplated and expressly recognized that, with respect to involuntary payment of union dues, a contract termination date would be given effect.[10] Continuation of union membership requirements after the stated term of an agreement, during the status quo period, while the union is precluded from striking or engaging in other self-help, is consistent with the purpose of RLA Sections 5, First and 6 "to prevent rocking of the boat by either side until the procedures of the Railway Labor Act [have been] exhausted." *Manning* v. *American Airlines*, 329 F.2d 32, 35 (2d Cir.), *cert. denied*, 379 U.S. 817 (1964). Once the statutory procedures have been exhausted, however, and both parties are free to engage in self-help, there is no warrant in the Act, in national labor policy as expressed in both the NLRA and the RLA, or in reason and logic for requiring a carrier to enforce union membership requirements or dues check-off.

This conclusion is supported by decisions under Section 8(a)(3) of the National Labor Relations Act, which is virtually identical to RLA § 2, Fourth and Eleventh,[11] and which establishes the rights which were to have been "extend[ed]" to RLA

---

10 The 1981-84 agreement reflects that recognition in Article 24(M), which obligated TWA to deduct initiation fees and monthly membership dues in favor of IFFA only "[d]uring the life of this Agreement." (72a) The dues check-off form itself expressly permitted revocation of the check-off authorization by an employee "upon the termination date" of the agreement. (73a) And, Article 24(B), addressing maintenance of membership by certain employees, refers explicitly to "the term of this Agreement." (67a)

11 As this Court recognized, construing the RLA in another context, "[t]o the extent that there exists today any relevant corpus of 'national labor policy,' it is in the law developed during the more than [50] years of administering our most comprehensive national labor scheme, the National Labor Relations Act." *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 383 (1969). For that reason, courts have historically referred to the NLRA for assistance in construing the Railway Labor Act. Surely, such referral is appropriate—if not mandated—when the pertinent provisions of the RLA were consciously modeled by Congress on parallel provisions of the NLRA, and their legislative history confirms that Congress intended to extend to RLA carriers and unions rights parallel to those available to employers and unions under the NLRA.

parties by § 2, Eleventh. Under the NLRA, union membership provisions may not be enforced after the term of the agreement that includes them because the statute is "understood to prohibit such practices unless they are codified in an *existing* collective-bargaining agreement." *Southwestern Steel & Supply, Inc.* v. *NLRB*, 806 F.2d 1111, 1114 (D.C. Cir. 1986) (emphasis in original).

The reason for this was long ago spelled out by the National Labor Relations Board, and endorsed by the U.S. Court of Appeals for the Third Circuit:

> The acquisition and maintenance of union membership cannot be made a condition of employment except under a contract which conforms to the proviso to Section 8(a)(3). So long as such a contract is in force, the parties may, consistent with its union-security provisions, require union membership as a condition of employment. However, upon the termination of a union-security contract, the union-security provisions become inoperative and no justification remains for either party to the contract thereafter to impose union-security requirements. *Bethlehem Steel Co.*, 136 N.L.R.B. 1500, 1502 (1962), *aff'd in pertinent part*, 320 F.2d 615, 619 (3d Cir. 1963), *cert. denied*, 375 U.S. 984 (1964).[12]

This is so even though, under the NLRA, terms and conditions of employment generally do survive the expiration of an agreement, and "an employer may not unilaterally alter, without bargaining to impasse, a contractual term that is a mandatory subject of bargaining." *NLRB* v. *Haberman Construction Co.*, *supra*, 618 F.2d at 302; *Carpenter Sprinkler Co.* v. *NLRB*, 605 F.2d 60, 64-65 (2d Cir. 1979); *AFTRA* v. *NLRB*, 395 F.2d 622, 624 (D.C. Cir. 1968).

12 *See also, e.g.*, *Southwestern Steel & Supply, Inc.* v. *NLRB*, *supra*, 806 F.2d at 1113-114; *NLRB* v. *Haberman Construction Co.*, 618 F.2d 288, 302-03 (5th Cir. 1980), *mod. on other grounds on reh'g en banc*, 641 F.2d 351 (5th Cir. Apr. 1981); *Robbins Door & Sash Co.*, 260 N.L.R.B. 659 (1982); *Peerless Roofing Co.*, 247 N.L.R.B. 500, 505 (1980), *enforced*, 641 F.2d 734 (9th Cir. 1981); *S. Freedman Electric Co.*, 256 N.L.R.B. 432, 443 (1981); *Hudson Chemical Co.*, 258 N.L.R.B. 152, 157 (1981); *NLRB* v. *United Auto Workers*, 297 F.2d 272, 274-75 (1st Cir. 1961); *Communications Workers of America* v. *NLRB*, 215 F.2d 835, 838-39 (2d Cir. 1954); *NLRB* v. *United Auto Workers*, 194 F.2d 698, 701-02 (7th Cir. 1952); *cf. Anheuser-Busch, Inc.* v. *Teamsters, Local 822*, 584 F.2d 41, 43 (4th Cir. 1978).

The opinion below includes only a passing reference to RLA § 2, Eleventh (15a) and makes no mention whatsoever of its legislative history. The court did acknowledge one of the many Circuit Court decisions recognizing that, under the NLRA, "union security provisions do not survive expiration of a contract . . . ." (16a) In a strange distortion of this Court's reliance in *FEC* on the "public service nature" of RLA industries to justify limited departure from existing contracts, however, the court below concluded that it also compelled continued enforcement of union security provisions after the stated term of a contract. And the difference in treatment under the RLA and NLRA was not explained by reference to the duration clause of the contract, but by saying that "the policies enunciated by the Court in *FEC* rise above any interpretation . . . of a collective bargaining agreement." (16a) (*But see* pp. 18-19 and 24-26, *infra*.)[13]

For fully forty years, with no apparent detriment to national labor policy or industrial peace, unions subject to the NLRA have been carrying out their representational duties during a hiatus between collective agreements without compulsory union dues and without the assistance of dues check-off. And, at least under the First, Second, Seventh and Ninth Circuits' view of national labor policy (*see* pp. 19-24, *infra*), unions in

13 As further justification for applying its "special rule" to union membership requirements, and illustrative of the court's misapprehension of the issues before it, the Eighth Circuit said: "Clearly, if the Union is to represent the flight attendants, it needs to collect dues, and enforcement of the check-off provision is integral to that process." (17a) No reason is given as to why this is any more "clear" under the RLA than under the NLRA.

In any event, the court's statement is ironic at best, given that the effect of its decision is to require working flight attendants to finance litigation aimed at displacing them from their jobs. (*See* n.2, *supra*.) Even more important, in these particular circumstances, it is an inversion of legislative intent, for it effectively permits the strikers (who, judging from the Union's contentions below concerning its financial condition, are not paying dues (42a)) to be "free-riders." (*See* n.9, *supra*.)

the airline industry have long been required to do the same if—having voluntarily entered into an agreement for a fixed term—they choose to pursue a strategy of self-help in support of their demands for a new agreement, rather than reaching agreement through the statutory procedures.

Implicit within the statutory scheme is the right of both parties to a labor dispute, after the statutory procedures have been exhausted, to "employ the full range of whatever peaceful economic power they can muster so long as its use conflicts with no other obligation imposed by federal law."[14] The Act does not require the employer to continue to assist the union in securing economic support for its exercise of self-help.

II. THE DECISION BELOW—IN DIRECT CONFLICT WITH THE HOLDING AND RATIONALE OF THE NINTH CIRCUIT IN *REEVE ALEUTIAN* AND AT ODDS WITH DECISIONS OF THE FIRST, SECOND AND SEVENTH CIRCUITS—DEMONSTRATES A COMPELLING NEED FOR GUIDANCE FROM THIS COURT CONCERNING THE PROPER APPLICATION OF ITS DECISION IN *FLORIDA EAST COAST RAILWAY*.

Presented with facts and contract language[15] identical in all material respects, the Eighth Circuit has reached a conclusion

14 *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, *supra*, 394 U.S. at 392.

15 Duration provisions identical in all material respects have been read by the Second, Seventh and Ninth Circuits as unambiguously creating *not* a continuing and merely "amendable" agreement (or a "partially renewable" agreement), but one that expires by its terms after service of a Section 6 notice of intended change. *Manning* v. *American Airlines*, 329 F.2d 32, 33 (2d Cir.), *cert. denied*, 397 U.S. 817 (1964); *FEIA* v. *Eastern Airlines*, 359 F.2d 303 (2d Cir. 1966); *IAM* v. *Reeve Aleutian Airways*, *supra*, 469 F.2d at 993; *ALPA* v. *United Airlines*, 802 F.2d 886, 891 (7th Cir. 1986). Indeed, both the Second and Ninth Circuits had so ruled at the time the duration provision was first agreed to by TWA and IFFA in 1978. These decisions of three other Circuit Courts were dismissed by the Eighth Circuit (10-11a)—with no apparent consideration of their bearing on the parties' intent in adopting the duration language of the 1981-84 agreement, or custom and practice in the airline industry.

The duration clause of the indefinite agreement found by the Seventh Circuit to be merely "amendable" in *EEOC* v. *United Air Lines*, 755 F.2d 94 (7th Cir. 1985), was substantially different from that in the TWA/IFFA agreement. The Seventh Circuit recognized that distinction when it held that the IAM agreement before it was materially different from the IAM-Reeve Aleutian agreement found by the Ninth Circuit to be terminable by service of a Section 6 notice. 755 F.2d at 99 ("There is a difference between providing that a contract shall lapse at a given date and that after that date it shall be subject to amendment in accordance with specified procedures.").

(*footnote continued*)

flatly contradictory to that of the Ninth Circuit concerning a carrier's obligation, after the end of the statutory status quo period, to continue in effect union membership and dues check-off provisions embodied in an agreement for a stated term.

The conflict has its genesis in divergent understandings of this Court's decision in *FEC*, which involved particular Rules contained in railroad agreements conceded by all parties to remain in effect after the status quo period ended. The Ninth Circuit properly concluded that *FEC* had no application to union security provisions in an agreement for a fixed term. 469 F.2d at 993. Misconceiving both the legal premises of *FEC* and the controlling facts of this case, the court below misread *FEC* as requiring it to construe the 1981-84 agreement between TWA and IFFA as "continuing" beyond its stated term (12a) and, therefore, obligating TWA to enforce the union membership requirement and to continue the dues check-off procedure after the end of the status quo period.

Review is required to resolve this conflict and to secure the uniformity of judicial administration that this Court has repeatedly declared is essential to national labor policy. Absent review, carriers and unions can hardly be expected to divine their respective rights and obligations under a Supreme Court authority from which lower court judges have drawn such different conclusions.

A. *FEC*: The Act Permits Limited Departures From an *Existing* Agreement In Order to Preserve a Carrier's Right to Self-Help.

In *FEC*, the Court did not consider whether union membership provisions in an agreement for a fixed term remained in effect during the self-help period. Rather, it considered whether a railroad, during a strike, could suspend Rules of its indefinite term labor contract (which were admittedly still in effect in accordance with their terms) and were, in fact, the subject of a pending Section 6 notice as to which the statutory mediation and status quo procedures had not been exhausted.[16]

Before this Court, the railroad argued that its obligation to comply with the existing agreements was suspended during the strike and, therefore, that wholesale departures from those agreements were permitted. The unions, supported by the United States, contended that RLA Section 2, Seventh required the carrier to operate in strict compliance with the existing agreements until exhaustion of the statutory procedures as to every proposed change, and that the unions' resort to self-help did not release the railroad from the letter of its statutory obligation.

The Court, with a single dissent by Justice White, rejected both positions and affirmed the Court of Appeals. Emphasizing that carriers have an affirmative duty to make "reasonable efforts to maintain the public service at all times" (384 U.S. at 245), it said that, if exhaustion of the statutory procedures were required as to every strike-related departure from each rule of existing agreements, "[t]he practical effect . . . would be to bring the railroad operations to a grinding halt" and "both the carrier's right of self-help and its duty to operate, if reasonably possible, might well be academic . . ." (*id.* at 246). This Court, in other words, read the RLA to permit departures from an *existing* agreement of indefinite duration, in order to

16 Railroad collective bargaining agreements typically consist of separate and independent "Rules" and provide that each Rule may be changed only after service of a Section 6 notice as to that particular rule. *See* Burgoon, *Mediation Under the Railway Labor Act*, National Mediation Board, *The Railway Labor Act at Fifty*, 72 (U.S.G.P.O. 1976).

vindicate the carrier's right of self-help and to permit the carrier to continue the public service required of it. The Court said nothing about continuation of provisions in an agreement for a fixed term, after the term had lapsed. (*See EEOC* v. *United Air Lines*, 755 F.2d at 99 (7th Cir. 1985) and n.15, *supra*.)

B. The Conflict Among the Circuits: Divergent Interpretations of *FEC*.

Four Circuit Courts of Appeals have spoken on *FEC*: the Ninth Circuit in *IAM* v. *Reeve Aleutian Airways*, *supra*, 469 F.2d 990; the First Circuit in *IAM* v. *Northeast Airlines*, 536 F.2d 975 (1st Cir.), *cert. denied*, 429 U.S. 961 (1976); the Seventh Circuit in *EEOC* v. *United Air Lines*, 755 F.2d 94 (7th Cir. 1985) and in *ALPA* v. *United Air Lines*, 802 F.2d 886 (7th Cir. 1986); and most recently the court below. The lack of uniformity reflected in these decisions, alone, is sufficient justification for granting the writ.

1. In *IAM* v. *Reeve Aleutian Airways*, as here, a Section 6 notice had been served; the parties had exhausted the mediation and status quo procedures of the RLA without reaching a new agreement; and the union had struck the carrier. 469 F.2d at 991-92. There, too, neither party had proposed a change in the union security provisions of the agreement. Indeed, only the union had served a Section 6 notice; the carrier "gave no notice of any intended change" in the agreement. *Id.* at 991.

When the union discontinued the strike, it requested the carrier to honor the union security provisions of the agreement; the carrier refused. The union then brought suit for a declaratory judgment "that the agreement continued in effect by operation of the Act save as to the provisions which had been subjected to the Act's procedures." *Id.* at 992.

The duration clause before the Ninth Circuit in *Reeve Aleutian* was, in all its essentials, the same as that before the court below:

Reeve Aleutian/IAM Contract

This agreement shall become effective November 1, 1966, and shall continue in full force and effect until April 1, 1968, and shall renew itself without change until each succeeding April 1st thereafter,

unless

written notice of intended change is served in accordance with Section 6 . . . by either party hereto at least sixty (60) days prior to April 1st in any year after 1967. (469 F.2d at 991)

TWA/IFFA Contract

Except as otherwise provided in this Agreement, this entire Agreement shall be effective August 1, 1981 [and] shall remain in effect until July 31, 1984, and thereafter shall renew itself without change for yearly periods

unless

written notice of intended change is served in accordance with Section 6 . . . by either party hereto, at least 90 days prior to the renewal date in each year. (78a)

The district court had held, as a matter of law, that the collective agreement "expired by its own terms . . . following . . . notice of proposed modifications in the existing agreement, although [the carrier] was obliged by the [RLA] to maintain the status quo until the statutory mediation provisions had been exhausted." 330 F. Supp. 332, 335 (D. Alaska 1971). It also held that the RLA did not operate to extend the term of the contract:

> While certain employee rights, such as pension and retirement benefits may become vested, and hence may retain their vitality after the expiration of the union contract which created them, *union security and dues check off provisions are matters of contract between the union and the employer and consequently do not survive the termination of the contract*. *Id*. at 335 (emphasis added).

On appeal, the IAM contended that, although the status quo period had ended, the expired agreement "continued in effect by operation of the Act" except as to those provisions that had been the subject of a Section 6 notice of proposed change. 469 F.2d at 992. The Ninth Circuit, however, agreed with the district court's conclusion that the carrier had no obligation, after the status quo period ended, to enforce the union membership or dues check-off provisions:

> "There is nothing in the Railway Labor Act which extends a contract beyond its termination date. 45 U.S.C.A. § 156 (1954) merely prohibits any unilateral changes in pay, rules, and working conditions until the statutory conciliation procedures have been exhausted and the 30-day mandatory waiting period has expired. . . .
>
> The terms of the agreement called for its termination on the first day of April following notice by *either* party of intended changes. It is irrelevant that [the carrier] never served notice of any intended changes, and it is of no consequence that only portions of the contract were subject to negotiation. The contract expired by its own terms on April 1, 1968. The only effect of the Railway Labor Act was to prevent the defendant from making any unilateral changes in pay, rules, and working conditions until remedies under the Act had been exhausted . . . ." 469 F.2d at 992-93 (emphasis in original).[17]

17 The Second Circuit reached essentially the same conclusion in *Flight Engineers International Association* v. *Eastern Air Lines*, 359 F.2d 303, 310 (2d Cir. 1966), where the union sought an order requiring the carrier to submit to a board of adjustment the claim that replacement of strikers had violated the parties' agreement. Agreeing with the carrier, the Court of Appeals held that after the agreement had expired by its terms, and the status quo period had ended, there was no contract to be interpreted and no obligation on the carrier's part to submit disputes to a System Board.

See also Manning v. *American Airlines*, *supra*, 329 F.2d at 34-35 (effect of Section 6 is to extend only for a "limited period," *i.e.*, until the end of the status quo period, dues check-off agreement that had "admittedly expired"); *ALPA* v. *Pan American World Airways*, 765 F.2d 377, 382 (2d Cir. 1985) (holding that "nothing in the Act, or the case law interpreting it . . . prevents parties from setting, by freely negotiated agreement," the duration of concessions on which they may reach agreement).

With respect to the IAM's reliance on *FEC*, the Ninth Circuit found that decision to have no application to the case before it because

> [*FEC*] dealt with a contract that had no termination date and that continued in force until a new contract had been reached. The question there was whether the contract continued in effect during the course of a strike. It was held that the strike did not serve to terminate the contract. Here, however, it is not the strike but the contract terms themselves that have brought the contract to an end. 469 F.2d at 993.[18]

2. The court below acknowledged that "[t]he *Reeve* case and its progeny, including *Aloha* and *Quantas* [*sic*], directly hold that airline contracts similar, but not identical, to the TWA contract here in issue come to an end upon impasse and, following a strike and self help period, the airline employer may change those working conditions which had not been proposed for change or bargained over." (11a) It said, however, that it would "not follow the *Reeve* rationale in this case." (13a)

Instead, the Eighth Circuit misapplied to the union security provisions of the "similar, but not identical contract"[19] the "special rules" it purported to find in *FEC*:

---

18 *See also IAM* v. *Aloha Airlines*, 776 F.2d 812, 816 (9th Cir. 1985); *IAM* v. *Qantas Airways*, 122 L.R.R.M. 2263 (N.D. Cal. 1985).

19 After saying that the "core language" of *FEC* "required" continuity in obligations (12a), the court below devoted less than one page of its opinion to the wording of the duration clause, summarily concluding that it "agree[d] with the district court's construction of the contract." (15a) That construction rests on a single word (taken out of context) from which the court speculated that " 'partial renewal seems implied . . . .' " (14a; emphasis added) Not even addressed is TWA's explanation that use of the phrase "entire Agreement" was occasioned by the introduction to the duration provision: "Except as otherwise specified in this Agreement . . . ." (78a)

(*footnote continued*)

> if a working condition has not been subject to the procedures of the Act, it may not be changed even after expiration of the status quo period unless truly necessary for the continued operation of the airline. (16a)

This statement of the "rule" ignored the central fact of *FEC*, that the contract there was not for a stated term, and that each Rule was treated, in the duration clause, as though it were a separate indefinite contract requiring specific Section 6 notice of change. It was because the contracts in *FEC* were unlimited in duration that the Ninth Circuit in *Reeve Aleutian* refused to apply a "rule" such as that announced by the Eighth Circuit to a contract with a stated term.

3. The First Circuit, citing *Reeve Aleutian* approvingly, has agreed with the Ninth Circuit. *IAM* v. *Northeast Airlines*, *supra*, 536 F.2d at 978 n.2 ("In general, the terms of a Railway Labor Act collective bargaining agreement are not controlling after the collective bargaining agreement and any subsequent status quo period expire.").

4. The Seventh Circuit, like the Ninth and First Circuits, has read *FEC* as "ar[ising] in a situation where the collective bargaining agreement was still in effect . . ." and rejected as "tenuous" a union's reliance on *FEC* "in a case in which the collective bargaining agreement had already expired prior to the strike . . . ." *ALPA* v. *United Air Lines*, *supra*, 802 F.2d at 898-99, 910.[20] Suggesting, however, yet a third possible

---

Apparently recognizing that the language of Article 28 hardly supports its construction, the court below resorted to extrinsic "evidence" of the parties' intent. (*But see* n.6, *supra*.) Under unanimous authority of other Circuits (n.15, *supra*), however, the meaning of Article 28 is clear: all that was required to prevent renewal of the agreement, was "written notice of intended change." (78a)

20 *Dicta* in an earlier Seventh Circuit decision under the federal Age Discrimination in Employment Act (29 U.S.C. §§ 621 *et seq.*) suggests a different view of *FEC*. *EEOC* v. *United Air Lines*, 755 F.2d 94, 98 (7th Cir. 1985). The panel there, however, assumed, without having to decide, that *Reeve Aleutian* was correct, finding the duration clause of

(*footnote continued*)

conclusion that might be derived from *FEC*—at least where some condition of employment other than union security is at issue and, therefore, RLA § 2, Eleventh does not govern—the Seventh Circuit noted:

> Although [*FEC*] arose in a situation where the collective bargaining agreement was still in effect, we see no reason to depart totally in the post-contract period from its holding that some showing of a reasonable business justification is required before a court will allow an employer to implement self-help measures which, whether intentional or not on their face, undercut the union's ability protected by the RLA to function as an effective representative for its members. *Id.* at 898-99.

C. The Court Below Misapplied *FEC*.

In *FEC*, the Court upheld the authority of the federal courts to permit a carrier, during a strike, to depart from the terms of an existing agreement to the extent "reasonably necessary" to allow the carrier to maintain the public service. 384 U.S. at 248. In that context, the Court's eloquent lecture about the "spirit" of the Act is not surprising. Because the Court interpreted the Act as permitting departures from an otherwise enforceable agreement when the carrier's right of self-help and the public service were at stake, it emphasized that the carrier would in any event not be permitted to deviate at will from the spirit of the Act—which is that existing agreements be honored. Everything the Court said, however, was premised on the existence of agreements that all parties conceded were in effect, in accordance with their terms, during the strike.[21]

---

the agreement before it to be materially different from that before the Ninth Circuit in *Reeve*. (*See* n.15, *supra*.)

21 The *FEC* decisions contain no fewer than a dozen references to the "existing agreements" between the parties. (384 U.S. 238, 241, 242, 243; 348 F.2d 682, 684, 685, 686; 252 F. Supp. 586, 587, 589) And the briefs submitted to the Court by all parties repeatedly emphasized that those agreements were indefinite and, therefore, in effect when the

(*footnote continued*)

The court below misread *FEC* by ignoring what this Court did (and did *not*) decide there and by focusing instead on what it said about its reasons for permitting only limited deviations from an existing and otherwise enforceable contract. This Court did not say that labor contracts could not expire by agreement, or that the spirit of the Act requires the honoring of expired agreements. Indeed, nothing in the Court's reference to the "spirit" of the Act suggests, as the court below concluded, that the Act *requires* "continuing agreements between management and labor." (12a)

Speaking of the unexpired contracts from which the carrier had been permitted to deviate, this Court said that "[w]ere a strike to be the occasion for a carrier to tear up and annul, so to speak, the entire collective bargaining agreement, labor-management relations would revert to the jungle." 384 U.S. at 247. The Court did not say that if a contract were allowed to expire by *agreement* there would be a reversion to the jungle. In fact, although carrier and employees are under the continuing obligation of RLA Section 2, First to make every reasonable effort to reach agreement, the Act does not regard their failure to do so as a prohibited "jungle" condition. To the contrary, as the Court fully acknowledged in *FEC*, the Act affords the parties the right to self-help if they have not reached agreement after exhausting the processes of the Act. 384 U.S. at 244.

---

railroad made the changes before the Court. *See, e.g.*, Consolidated Brief of Railway Labor Executives Association, 15; Reply Brief of Association of American Railroads ("AAR"), 2; Brief for the United States, 24 n.17; Brief of AAR, 26; Brief for the United States, 38-39 n.27; Brief for the United States as Respondent in No. 783, 4; Reply Brief of AAR, 29; Brief of AAR, 26, *reprinted in* 98 U.S. Supreme Court Records and Briefs (Oct. Term 1965).

Toward the end of its opinion, the Eighth Circuit apparently acknowledged that the agreements before the Court in *FEC* had not expired by their terms. (18a) At no other point, however, did the Eighth Circuit make any reference to that critical factual distinction. Instead, it relied on the "eloquent" language of *FEC*, which related to unexpired agreements, to hold that *FEC* "requires" that an agreement with a stated term be construed to prevent its expiration.

This Court simply had no occasion in *FEC* to address whether carriers and unions may, consistent with the policies of the Act, negotiate a termination date for their agreements, because the parties there had not in fact done so. Nor was it called upon to consider whether the spirit of the Act requires that collective agreements be construed as "continuing" (12a) even if they are for a specified term; no such agreement was before the Court. Even more important, given that only union membership and dues check-off are at issue here, the Court had no occasion to speak—and did not speak—on the policies expressed in RLA Section 2, Eleventh or their application to a contract for a stated term.

In the particular circumstances presented here, it is incorrect to take out of context, and "emphasize," as did the court below, talk of "tear[ing] up . . . the entire collective bargaining agreement" and "rever[sion] to the jungle." (13a) Enforcement of Article 28 of the agreement between TWA and IFFA—as written—would no more remit the parties "to the jungle" than does the NLRA when it treats union security and dues check-off provisions as solely a product of voluntary agreement and, therefore, extinct when a contract for a fixed term expires.

III. REVIEW SHOULD BE GRANTED TO DISPEL THE UNCERTAINTY AND INSTABILITY ENGENDERED BY THE DECISION BELOW THROUGHOUT THE AIRLINE INDUSTRY.

The court below took "judicial notice that labor relations in the airline industry have entered a different era, one of strife and turmoil . . . ." (15a) If its decision is allowed to stand, that statement may well be a self-fulfilling prophecy. Even if there were no conflict in the Circuits, therefore, review of the "special rule" applied by the court below to union security provisions would be warranted because of its potentially broad and destabilizing effects on labor relations in the airline industry.

No matter how salutary the Eighth Circuit believed its so recently announced rule to be as a general matter, extending that theory to union membership and dues check-off provisions does not accord with the realities of the bargaining process or with custom and practice in the airline industry. It is also clearly at cross-purposes with the Act—which was intended as a mechanism for resolving disputes, not creating them.

Unlike carriers in the railway industry, air carriers typically "negotiate complete contracts which expire in their entirety at an agreed-upon date."[22] Common are duration clauses, like that in the 1981-84 agreement between TWA and IFFA, and that before the Ninth Circuit in *Reeve Aleutian*, which specify a fixed term for the complete contract and provide for automatic renewal for yearly periods, "unless" either party serves a notice of intended change before the end of the stated term.[23]

Until now, a carrier has been able to agree to union security and dues check-off provisions, as part of such an integrated labor contract, with the knowledge that they would be coexistent with the labor peace that the contract (and any subsequent status quo period imposed by statute) represent. It has not been necessary, when a Section 6 notice of intended change is served, to inject the sensitive and potentially inflammatory issues of union security and dues check-off into the negotiations, by proposing to delete those provisions, if they would be acceptable to the carrier in a new integrated agreement. Nor has it been necessary to clutter the bargaining table, or to divert the parties' resources and energies from the genuine issues in the negotiations, by engaging in futile bargaining over the conditions that will govern in the event of a strike and the hiring of strike replacements.

---

22 Burgoon, *Mediation Under the Railway Labor Act*, National Mediation Board, *The Railway Labor Act at Fifty*, 94 (U.S.G.P.O. 1976).

23 *See, e.g., Manning* v. *American Airlines*, *supra*, 329 F.2d at 33; *FEIA* v. *Eastern Airlines*, *supra*, 359 F.2d at 310; *IAM* v. *Reeve Aleutian Airways*, *supra*, 469 F.2d at 993; *IAM* v. *Aloha Airlines*, *supra*, 776 F.2d at 813; *ALPA* v. *United Air Lines*, *supra*, 802 F.2d at 891.

Such a narrowing of the areas of controversy serves to facilitate voluntary adjustment of disputes and, therefore, effectuates the purposes of the Act. it does not reflect, and cannot reasonably be viewed as evidencing, a willingness by the carrier to accept union security provisions outside the context of an overall agreement. The Eighth Circuit's decision fails to recognize these realities.

The effect of the decision below will be to require every carrier, at the beginning of negotiations, to propose the elimination of compulsory union membership and dues check-off provisions. The full implications of such a rule, in an endeavor where atmospherics are as vital as substance, are difficult to predict. A proposal to eliminate union security requirements may inflame the negotiations; it may be used by either party to justify a failure to reach agreement on other subjects; it may produce a strike that would not otherwise have occurred.

Plainly, however, requiring such a proposal—as a prerequisite to the expiration of union membership requirements—would at the very least broaden the area of conflict between the parties, unnecessarily inject sensitive issues into the negotiations, and taint the bargaining atmosphere that the Act seeks to create. Thus, the "special rule" announced by the Eighth Circuit to foster collective bargaining would, as applied to union security provisions, reduce the likelihood of voluntary adjustment of disputes, thereby frustrating the purposes of the Act.

CONCLUSION

Th decision below is erroneous as a matter of law and counterproductive as a matter of industrial relations. If allowed to stand, in direct conflict with decisions of the Ninth Circuit and at odds with decisions of the First, Second and Seventh Circuits, it will contravene the Congressionally established limitations on union security agreements expressed in RLA Section 2, Eleventh, undermine the federal interest in a uniform national labor policy and fundamentally disturb the negotiating atmosphere that the Act

seeks to create. It will also mean that present TWA employees will be required to continue to support, against their will, an organization litigating to remove them from their jobs, and using their dues for that purpose.

The court below read *FEC* as imposing "special rules" against change, when that case actually announces a special rule *for* change in existing contracts of indefinite duration, and has no relevance to contracts that specifically provide for a fixed term duration.[24] This Court has never decided that, under the RLA, any condition of employment, particularly union security clauses, continues in an indefinite status quo period after the expiration of the statutory status quo period. And, in this era of deregulation, review of the unprecedented decision of the Court below is necessary to consider whether carriers are to be subjected to those additional burdens as they struggle to survive in a fiercely competitive economic environment.

This petition for a writ of certiorari to review the decision of the U.S. Court of Appeals for the Eighth Circuit should, therefore, be granted.

Respectfully submitted,

MURRAY GARTNER
PAUL E. DONNELLY
MARK A. BUCKSTEIN
MICHAEL A. KATZ

Attorneys for Petitioner

CAROLE O'BLENES
KEVIN CHAPMAN

Of Counsel

April 13, 1987

---

24 Questions about the meaning of *FEC* have also been raised in *Burlington Northern Railroad Co.* v. *Brotherhood of Maintenance of Way Employees*, No. 86-39, now pending before this Court, but they should more properly be addressed in this case.

APPENDICES

APPENDIX A

Opinion and Judgment of the U.S. Court of Appeals for the Eighth Circuit

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 86-1998

TRANS WORLD AIRLINES, INC.,

Appellant,

—v.—

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Appellee.

Emergency Motion for Stay of Judgment from the United States District Court for the Western District of Missouri.

Submitted: October 15, 1986

Filed: January 14, 1987

Before LAY, *Chief Judge*, BRIGHT, *Senior Circuit Judge*, and WOLLMAN, *Circuit Judge*.

BRIGHT, *Senior Circuit Judge*.

The question presented in this case is whether the union security and dues check-off provisions contained in Article 24(A-L) of the 1983 collective bargaining agreement between TWA and The Independent Federation of Flight Attendants (Union) are now in effect and should be enforced.

On cross motions for summary judgment, the district court[1] granted summary judgment in favor of the Union and required TWA to implement the dues check-off and union security provisions of the collective bargaining agreement. TWA on this appeal contends that the agreement has expired and that therefore it need not implement those provisions of the agreement. For the reasons set forth below, we affirm the summary judgment in favor of the Union.

I. Background

TWA and the Union entered into a collective bargaining agreement containing the following duration clause:

> Except as otherwise specified in this Agreement, this entire Agreement shall be effective August 1, 1981 [and] shall remain in effect until July 31, 1984 and thereafter shall renew itself without change for yearly periods unless written notice of intended change is served in accordance with Section 6, Title 1 of the Railway Labor Act, as amended, by either party hereto, at least 90 days prior to the renewal date in each year.

In 1984, notices of intended change were exchanged by the parties pursuant to section 6 of the Railway Labor Act (RLA), 45 U.S.C. § 156,[2] and the parties proceeded, under the auspices of the National Mediation Board (NMB), through the Act's mandatory statutory negotiation and mediation procedures. In January of 1986, TWA refused the NMB's offer pursuant to

---

1 The Honorable Howard J. Sachs, United States District Judge for the Western District of Missouri.

2 Section 156 reads:

> Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title [45 U.S.C. § 155], by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

45 U.S.C. § 156.

section 5 of the RLA, 45 U.S.C. § 155, of binding arbitration. The parties were released by the NMB and allowed to engage in self help as of March 7, 1986. On that date, the Union struck the airline and TWA implemented new working conditions, including abrogation of the union security and dues check-off provisions contained in Article 24(A-L) of the agreement. These provisions were not the subject of a section 6 notice in which TWA sought changes in the collective bargaining agreement.

On April 17, 1986, TWA filed this action in the district court seeking declaration that the collective bargaining agreement had expired and that TWA therefore was not obligated to observe the union security or related provisions, whether subject to negotiations or not. On May 17, 1986, the Union ended the strike and the flight attendants offered to return to work.

Thereafter, on August 1, 1986, the district court ruled on cross motions for summary judgment determining that TWA is required to implement the dues check-off and union membership provisions of Article 24 of the collective bargaining agreement. In its decision, the district court held that the collective bargaining agreement did not by its terms expire as to those provisions which had not been subject to reopening by the parties and that the provisions of the RLA prohibit a carrier from making a unilateral change in conditions which were not the subject of a section 6 notice. The district court rested its decision on both grounds.

In its analysis, the district court first assumed that the contract provisions terminated upon the parties reaching an impasse after attempting to resolve the disputes subsequent to the contract termination date of July 31, 1984. Assuming termination, the district court held that the provisions of the RLA require that those contract terms between the parties which are not subject to dispute continue to govern their relationship as to any terms not in dispute. Thus, because the union security clauses were never sought to be changed by TWA in its section 6 notice to the Union, those clauses not in issue, including the union security clause, continue to be effective in governing the rights of the employer and the Union.

As further ground for its judgment, the district court construed the durational language that "this entire agreement * * * shall renew itself without change for yearly periods" to mean that except for those contract terms subject to reopening, all other provisions of the contract remain in effect and control the rights and obligations of the parties.

TWA brings this appeal, arguing that the collective bargaining agreement has by its own terms expired and that the RLA does not prohibit the parties from fixing a term for expiration of the agreement after which time all provisions of the pre-existing collective bargaining contract, not expressly reviewed, are terminated.

TWA, in appealing the adverse judgment, also sought a stay of enforcement of the union security provisions pending appeal. We granted a partial stay on August 26, 1986, but upon submission of the case to the panel, on October 15, 1986, the majority of the panel dissolved that stay. We turn to the merits of the appeal.

II. Discussion

The district court stated the issues in the case as follows: (1) Did Article 28, the duration provision of the contract, cause parts of the contract that were not subject to bargaining to continue in effect, or did notice of certain intended changes trigger a total termination of the agreement? (2) Assuming the

contract provided for total termination upon impasse over proposals for limited changes, is such a duration provision lawful under the Railway Labor Act?

As we have observed, the district court answered the first issue by holding that those parts of the contract not subject to bargaining did continue in effect. On the second issue, the court held that such a duration provision is unlawful under the RLA. Thus, TWA lost on both issues. In this opinion, we deem it appropriate to rest our decision on the first issue, that is, that the union security clause which was not the subject of reopening has not been terminated, and we need not address the second issue.

A. Duration Clause

We construe the terms of the duration clause of this agreement in light of the national labor policy enunciated by the Railway Labor Act, which governs airlines as well as railroads, and, in light of pertinent decisions bearing on the issues.

The RLA was enacted with a number of purposes in mind:

> (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

45 U.S.C. § 151a.

To enable the parties to a collective bargaining agreement to attain these goals, Congress has established mandatory, and "almost interminable," procedures which must be followed in

settling disputes such as exist here. *Detroit & Toledo Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 149 (1969). Any party seeking to make changes in rates of pay, rules or working conditions of employees must file a notice pursuant to section 6 of the RLA, 45 U.S.C. § 156, and confer with the other party. 42 U.S.C. § 152, Seventh. If the parties are unable to resolve their dispute, they may invoke the services of the NMB or the Board may, in an emergency situation, proffer its services. 45 U.S.C. § 155, First. If the NMB is unsuccessful in helping to resolve the dispute, the Board must attempt to induce the parties to agree to arbitration. Said arbitration is not, however, mandatory. *Id.* If the dispute is not resolved under these provisions of the Act and the NMB finds the dispute should "threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service," the NMB must contact the President of the United States who may set up an Emergency Board to evaluate the dispute and report to him. 45 U.S.C. § 160. Throughout this period, the parties may not alter the status quo and no change may be made in those rates of pay, working conditions or rules which are the subject of the dispute. It is only after all statutory procedures have been exhausted that the parties may engage in self help.

Congress, in enacting these detailed procedures, sought "to encourage collective bargaining by railroads and their employees in order to prevent, if possible, wasteful strikes and interruptions of interstate commerce." *Detroit & Toledo Shore Line R.R.*, 396 U.S. at 148 (footnote omitted). This detailed statutory scheme has bargaining as its major thrust. At the same time, it seeks to avoid any interruption in commerce. *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377-78 (1969). The Act attempts to provide the parties with every opportunity to resolve their labor disputes through bargaining and negotiation.

The Supreme Court recognized the central role of bargaining and the continuity of the relationship between management and labor in industries subject to the RLA, in holding that where terms in a collective bargaining agreement have not been the subject of dispute, those terms continue to bind the parties.

Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees, AFL-CIO v. Florida East Coast Ry. Co., 384 U.S. 238 (1966) (*FEC*). In *FEC*, during a strike over a wage increase and notice requirements prior to layoffs and job abolition, and after complying with the RLA's procedural requirements and entering the self help stage, the railroad resumed operations with a substantially different labor force with whose members it made individual employment agreements that were substantially different from the existing collective bargaining agreements. A number of the changes made by the railroad had not been the subject of a section 6 notice, nor had they been subject to RLA procedures. The Supreme Court held that given the public service nature of the business, *id.* at 244, and its responsibility to the public to maintain the public service at all times, *id.* at 245, the railroad could

> make only such changes as are truly necessary in light of the inexperience and lack of training of the new labor force or the lesser number of employees available for the continued operation. The collective bargaining agreement remains the norm; the burden is on the carrier to show the need for any alteration of it, as respects the new and different class of employees that it is required to employ in order to maintain that *continuity of operation* that the law requires of it.

Id. at 248 (emphasis added). The Court further limited this power to change or revise the collective bargaining agreement by holding that it must be "closely confined and supervised" by the courts, *id.* at 246, recognizing that

> [t]hese collective bargaining agreements are the product of years of struggle and negotiation; they represent the rules governing the community of striking employees and the carrier. That community is not destroyed by the strike, as the strike represents only an interruption in the continuity of the relation. Were a strike to be the occasion for a carrier to tear up and annul, so to speak, the entire collective bargaining agreement, labor-management rela-

> tions would revert to the jungle. A carrier could then use the occasion of a strike over a simple wage and hour dispute to make sweeping changes in its work-rules so as to permit operation on terms which could not conceivably have been obtained through negotiation. Having made such changes, a carrier might well have little incentive to reach a settlement of the dispute that led to the strike. It might indeed have a strong reason to prolong the strike and even break the union. The temptation might be strong to precipitate a strike in order to permit the carrier to abrogate the entire collective bargaining agreement on terms most favorable to it. The processes of bargaining and mediation called for by the Act would indeed become a sham if a carrier could unilaterally achieve what the Act requires be done by the other orderly procedures.

Id. at 246-47 (footnote omitted).

The Supreme Court thus recognized that bargaining is central to the RLA and that even the existence of a strike does not empower management to annul those terms of the collective bargaining agreement that had not been subject to prior bargaining.

The very words of TWA's reopener notice amply demonstrates that TWA itself has recognized the limited nature of its reopening of the collective bargaining agreement and that a notice to change is not a notice to terminate the agreement in the event an impasse is reached is strongly evidenced by the very words of TWA's reopener notice. In its letter of February 29, 1984, TWA proposed eliminating certain items of compensation, amending certain articles relating to expenses, credits and bidding procedures, and modifying certain other procedures. In its conclusion, TWA reserved the right to propose further "additions, deletions, modifications or other changes in the agreement * * *". Letter from J. W. Hoar, Director/ Technical & Contract Liaison, TWA, to Arthur Teolis, President, The Independent Federation of Flight Attendants (Feb. 29, 1984), in Affidavit of Counsel Attaching Certain Pertinent Portions of the District Court Record, Exhibit 3, Affidavit of William A. Jolley (Aug. 20, 1986). Nowhere does TWA suggest

that failure to reach an accord would terminate the balance of the terms and provisions of the agreement.

Further, the affidavit of William A. Jolley clarifies the understanding of the parties as to the continuity of the terms of the collective bargaining agreement, including those terms not reopened. That affidavit, which is undisputed, states in part:

> 3. Since April 1, 1977 and continuing to date I have had numerous discussions with various TWA officials and representatives concerning interpretation of terms of the collective bargaining agreement, grievance handling, arbitrations and in the course of numerous collective bargaining negotiations sessions. At no time prior to receipt of an April 25, 1986 letter signed by J.W. Hoar have I ever heard any such official or representative of TWA refer to an "expiration" date of the collective bargaining agreement or speak in terms of that agreement "expiring" or "terminating" or in any other way suggesting or implying that on or after March 7, 1986, TWA could or have the right to unilaterally implement or change terms of conditions of employment other than those which had been subject to Section 6 Notices and made the subject of collective bargaining. On the contrary, since April 1, 1977 and until April 25, 1986, TWA officials and representatives referred to the "amendable" date of the Agreement and spoke in terms of that Agreement "becoming amendable."

Affidavit of Counsel Attaching Certain Pertinent Portions of the District Court Record, Exhibit 3, Affidavit of William A. Jolley (Aug. 20, 1986).

TWA, in its claim that it is no longer bound by the union security clause, or indeed any other provision of the collective bargaining agreement, asserts that the contract came to a complete termination when the parties reached an impasse in their bargaining. Therefore, because the self help period has ended with the formal ending of the strike, TWA can disregard any provision of the previous collective bargaining agreement. TWA contends that the duration clauses analyzed by the

Second, Seventh and Ninth Circuits support its view that the contract terms of an airline's collective bargaining agreement can expire and, comparing the present duration clause with those in other contracts, there exists no reasonable basis for concluding that the TWA-Union contract in issue here has not expired.

TWA relies principally on *EEOC v. United Airlines*, 755 F.2d 94 (7th Cir. 1985); *IAM v. Reeve Aleutian Airways*, 469 F.2d 990 (9th Cir. 1972); *Flight Eng'r Int'l Ass'n, EAL Chapter v. Eastern Airlines*, 359 F.2d 303 (2d Cir. 1966); and *Manning v. American Airlines*, 329 F.2d 32 (2d Cir. 1964). In further support of the *Reeve* case, TWA cites *IAM v. Aloha Airlines*, 776 F.2d 812 (9th Cir. 1985) and *IAM v. Quantas Airways*, 122 L.R.R.M. 2263 (N.D. Cal. 1985).

In our view, *EEOC v. United Airlines*, decided by the Seventh Circuit, does not support TWA's position. Indeed, Judge Posner's opinion seems to reject the central thesis of TWA's analysis in construing the duration clause at issue there as creating an amendable, not a terminable, contract. Nor does the Second Circuit's opinion in *Manning* support TWA's position. *Manning* dealt with a dues check-off agreement that was specifically excluded from the contract's automatic renewal clause. The Second Circuit held that the check-off provision was a "working condition" within the meaning of section 6 of the RLA, thus coming within the status quo provisions of section 6. The clause, therefore, could not be unilaterally abrogated by the airline. In *Manning*, the parties agreed that the check-off provision expired on April 30, 1963, and that the provision did not come within the general renewal provision of the contract. Nevertheless, the provision remained in effect subject to the application of section 6 of the RLA, requiring written notice of change, bargaining and mediation. The *Manning* court at no time addressed whether or not contract terms not subject to reopening and bargaining would automatically expire on impasse.

Two other Second Circuit cases cited by appellant are not especially revealing. In *Air Cargo Inc. v. Local Union 851*, 733 F.2d 241 (2d Cir. 1984), the court considered and decided that the status quo provisions of section 6 required that the union

maintain the actual working conditions of an organization performing work for an air carrier. While the court referred to the expiration of the agreement in that case, the discussion does not indicate that the contract between the union and the employer contained a duration clause providing for automatic renewal as in the airline contract at issue here. TWA's citation of the *Eastern Airlines* case is equally without persuasive effect. Nowhere in that opinion does the Second Circuit discuss the precise issue before us even though that court agreed with the trial court that the underlying collective bargaining agreement between the parties had terminated. That case concerns itself with issues that were the subject of much controversy among the parties and over which the parties had engaged in sustained bargaining and mediation. The case does not deal with provisions of the contract which were not in dispute. Moreover, the *Eastern Airlines* opinion does not discuss the policy considerations cited in *FEC*, inasmuch as it predates *FEC*.[3] Thus, TWA's position that on impasse all provisions of the collective bargaining agreement terminate rests essentially on a comparison of the duration clause in the instant litigation with that at issue in *Reeve* and the acceptability of *Reeve* as persuasive authority here.

The *Reeve* case and its progeny, including *Aloha* and *Quantas*, directly hold that airline contracts similar, but not identical, to the TWA contract here in issue come to an end upon impasse and, following a strike and self help period, the airline employer may change those working conditions which had not been proposed for change or bargained over. The agreement in *Reeve* read:

> This agreement shall become effective November 1, 1966, and shall continue in full force and effect until April 1, 1968, and shall renew itself without change until

---

3 Both sides seem to derive some comfort from *Air Line Pilots Ass'n Int'l v. United Air Lines*, Nos. 85-2726 and 85-2833 (7th Cir. Sept. 29, 1986). This case does not cast much light on the issue before us but at least in theory seems to support the union's position. The issue in that case focused on the court's obligation "to ascertain whether the various self-help measures employed by both United and ALPA unlawfully impinged upon statutory protections provided under the RLA." *Id.*, slip op. at 15.

> each succeeding April 1st thereafter, unless written notice of intended change is served in accordance with Section 6, Title 1, of the Railway Labor Act, as amended, by either party hereto at least sixty (60) days prior to April 1st in any year after 1967.

469 F.2d at 991. The opinion in the Ninth Circuit quotes and affirms the district court's statement that:

> The terms of the agreement called for its termination on the first day of April following notice by *either* party of intended changes. It is irrelevant that the defendant [Company] never served notice of any intended changes, and it is of no consequence that only portions of the contract were subject to negotiation. The contract expired by its own terms on April 1, 1968.

Id. at 992-93.

An examination of the district court opinion suggests that the parties did not present the issue of contract interpretation to the district court, for its opinion stated that "[t]he sole issue presented is whether the Railway Labor Act, 45 U.S.C.A. § 151 *et seq.*, has the effect of extending a collective bargaining agreement beyond the termination date specified in the agreement." 330 F. Supp. 332, 333-34 (D. Alaska 1971). Moreover, the district court's discussion indicates that the union predicated its claim for relief solely on the *FEC* case, not on the contract terms. *Id.* at 334. The district court distinguished *FEC* on grounds that *FEC* related to unexpired agreements. The district court, without citation to any authority in cases under the RLA, stated "[a]s a matter of law, the contract expired by its own terms * * *." *Id.* at 335.

Neither the district court opinion nor the Ninth Circuit opinion in *Reeve* gives any detailed consideration to construction of the renewal clause in a manner consistent with the policies of the RLA and the core language of *FEC* that requires stable and continuing agreements between management and labor.[4] We emphasize that core language in *FEC*:

---

4 We note that *Reeve* relied on *Eastern Airlines* which, as we have observed, antedated *FEC*.

> These collective bargaining agreements are the product of years of struggle and negotiation; they represent the rules governing the community of striking employees and the carrier. That community is not destroyed by the strike, as the strike represents only an interruption in the continuity of the relation. Were a strike to be the occasion for a carrier to tear up and annul, so to speak, the entire collective bargaining agreement, labor-management relations would revert to the jungle.

384 U.S. at 246-47 (footnote omitted). Moreover, the Ninth Circuit opinion gives no consideration to what the Supreme Court referred to as the spirit of the Act:

> While the carrier has the duty to make all reasonable efforts to continue its operations during a strike, its power to make new terms and conditions governing the new labor force is strictly confined, if the spirit of the Railway Labor Act is to be honored.

Id. at 247 (footnote omitted).

We will not follow the *Reeve* rationale in this case.

The district court noted in the present case that as to contract interpretation, the *Reeve* case is subject to question—realistically, the July 31, 1984 date is not a termination date at all but it is a date that serves as a measuring point for the ninety-day notice required prior to the making of intended changes to the contract. On this issue of contract interpretation, District Judge Sachs wrote further:

> In *EEOC v. United Air Lines, Inc.*, 755 F.2d 94 (7th Cir. 1985), Judge Posner avoided a ruling flatly disapproving of the *Reeve* decision, 469 F.2d 993 [sic], by construing the duration clause in the airline contract before him as creating an amendable rather than a terminable contract. The language under consideration specified that the agreement "shall remain in full force and effect through November 1, 1978, and thereafter shall be subject to change by service of a notice as provided for in Section 6" of the Railway Labor Act. 755 F.2d at 97. Although the district court had concluded that the con-

tract had terminated in its entirety, the Seventh Circuit disagreed. The appellate ruling was that "the service of the notice is the mode of amendment, *implying* that what is not sought to be changed continues in effect. November 1 really is not a termination date at all; it is the date before which no changes can be made." *Id.* (Emphasis added.)

The opinion continues:

> The present contract contains a duration clause providing:
>
> > Except as otherwise specified in this Agreement, this entire Agreement shall be effective August 1, 1981 [and] shall remain in effect until July 31, 1984, and thereafter shall renew itself without change for yearly periods unless written notice of intended change is served in accordance with Section 6 . . . of the Railway Labor Act by either party hereto, at least 90 days prior to the renewal date in each year.
>
> This language shows that a *total* renewal occurs if no notice is received. As in *EEOC*, there is no express language terminating the agreement in the event of a notice of intended change. While the notice prevents total renewal, nothing in the wording prevents partial renewal. On the contrary, partial renewal seems implied in the language preventing renewal of the "entire" agreement. The reference to the "entire" contract is useless, by the TWA interpretation, and merely serves as emphasis. It is more likely that it has an operative purpose, distinguishing between all or parts of the agreement. The language appears to create an amendable contract, as in *EEOC*, with prospective changes limited to the subject matter of the notice (footnote omitted).

Judge Sachs concluded:

> The contract in question is amendable in accordance with its provisions and the Railway Labor Act. It does not wholly terminate, either automatically or upon service of

> notice of a limited number of intended changes. The union security provision continues in effect, * * *.

We agree with the district court's construction of the contract.

The RLA, in its application to the airlines and to this contract, which has a forty-year history, represents a day when stability in labor relations represented the norm in the public transportation industries. While we take judicial notice that labor relations in the airline industry have entered a different era, one of strife and turmoil resulting from deregulation and takeovers by "corporate raiders," the underlying statute and the contract language that was written in a manner consistent with the RLA still requires a construction which emphasizes continuity in existing relationships between management and labor, except where either side has requested a change. In the latter event, the proposed change must be the subject of collective bargaining.

B. Dues Check-Off Provision

TWA argues that a dues check-off provision is purely a creature of contract and thus is of a special nature such that once the parties have bargained to impasse over any disputed provisions in the agreement, nothing in the RLA requires continuation of the check-off provision in the absence of an integrated labor agreement. We disagree.

As both parties agree, a dues check-off provision is purely a creature of contract. Section 2, Eleventh, of the RLA allows inclusion of such a clause in collective agreements and, as TWA concedes, continuation of the provision through the status quo period is consistent with the policies reflected in section 6 of the RLA. TWA, however, contends that once all statutory procedures have been exhausted, no purpose of the RLA is served by continuing the dues check-off provision in effect, as such regulation of the relationship between the union and its members is lawful only by virtue of the collective agreement.

TWA supports this argument by reference to *NLRB v. Haberman Constr. Co.*, 618 F.2d 288, 302-03 n.16 (5th Cir. 1980), *modified on other grounds*, 641 F.2d 351 (5th Cir. 1981), a case arising under the National Labor Relations Act (NLRA). There the Fifth Circuit recognized that union security provisions do not survive expiration of a contract even though provisions governing terms and conditions of employment generally do survive expiration of an agreement and may not be changed until the parties have bargained to impasse.

Haberman, however, is not persuasive. The Fifth Circuit reviewed a contract governed by the NLRA and therefore did not discuss *FEC* or the general policies of the RLA. While cases under the NLRA may be instructive, the contract at issue here is under the RLA and must be evaluated in light of its policies, which are in some respects unique to the RLA and those industries subject to its provisions. As the Supreme Court recognized in *FEC*, *supra*, the importance of the industry's public service nature, and its responsibility to maintain that service, warrants special rules. One of those rules is that if a working condition has not been subject to the procedures of the Act, it may not be changed even after expiration of the status quo period unless truly necessary for the continued operation of the airline. *FEC*, 384 U.S. at 248.

In *Cox v. Northwest Airlines*, 319 F. Supp. 92 (D. Minn. 1970), the district court emphasized the importance of *FEC* to the maintenance of labor relations under the RLA and noted that the policies enunciated by the Court in *FEC* rise above any interpretation of the language of a collective bargaining agreement:

> [T]he arguments advanced by the [*FEC*] Court for protecting the integrity of the collective bargaining agreement and the parade of horrors which the Court feels would result from a failure to do so, are not dependent upon or affected in any manner by an interpretation of the * * * collective bargaining agreement. That this is quite clearly the case is emphasized by the fact that the court clearly held that Section 2 Seventh does not apply during a strike and relied upon the overall thrust of the Railway Labor Act as a rationale for limiting departure from the terms of the collective bargaining agreement. The Court said: "[The carrier's] power to make new terms and conditions governing the new labor force is strictly confined, if the spirit of the Railway Labor Act is to be honored." It can hardly be seriously asserted that the "spirit" of the Act is determined by language selected by the draftsmen of * * * clauses in collective bargaining agreements.

Id. at 98 (footnote omitted). We agree.

TWA does not dispute that the Union remains the recognized collective bargaining agent for the flight attendants. Clearly, if the Union is to represent the flight attendants, it needs to collect dues, and enforcement of the check-off provision is integral to that process. Moreover, dues check-off is recognized as a working condition under the RLA. *Manning*, 329 F.2d at 34-35. Because the contract at issue here continues in effect as to provisions other than those subject to notice of intended change, no reason exists for automatic abrogation of the check-off provision upon the parties reaching an impasse. The provision was never reopened as a subject for bargaining; nor has TWA demonstrated how its termination is necessary to TWA's continued operation. While we recognize that there are existing disputes between various employees, *e.g.*, over the seniority rights of cross-over employees as opposed to newly hired employees, these are not concerns of TWA but are for the union to deal with in carrying out its responsibility to represent all union members.

III. Conclusion

In sum, to read the duration clause in the manner TWA suggests would completely undermine the collective bargaining nature of the Act. The only way to effectively achieve the goals of the Railway Labor Act is to require the parties to negotiate and mediate over those changes they wish to make. The TWA-Union duration clause was written to facilitate such negotiation and mediation. It is not for this court to rewrite the clause in the way TWA now wishes it was written, and to do so in this

case would cut out the very heart of the Railway Labor Act—collective bargaining.

In light of our holding that the agreement at issue has not expired,[5] the Supreme Court's decision in *FEC* is controlling here. As discussed above, TWA may only make those changes "as are truly necessary in light of the inexperience and lack of training of the new labor force or the lesser number of employees available for the continued operation" of the airline. *FEC*, *supra*, 384 U.S. at 248. Thus, for the reasons we have stated, we affirm the judgment of the district court.

We add this comment concerning TWA's position. To read the clause as proposed by TWA frustrates the basic purpose of the RLA. An airline employer, such as TWA, may flout the entire purpose of the RLA by not filing a section 6 notice with regard to certain changes it intends to make. Under such circumstances, the carrier may hide its true intention to make certain changes so that the change is never negotiated and the NMB never has the opportunity to mediate the dispute. This leaves the carrier free to unilaterally change a condition of employment, here the extremely important condition of union security, without ever having to negotiate, mediate or arbitrate the dispute. There is simply nothing in the duration clause at issue here which leads this court to conclude that the parties intended a result so at odds with the RLA. Against this backdrop, we believe the district court correctly decided the effect of the duration clause.

Affirmed.

A true copy.

Attest:

CLERK, U. S. Court of Appeals, Eighth Circuit.

---

5 In view of our holding that the terms of the collective bargaining agreement not reopened still remain in effect, it is unnecessary for us to address whether or not the RLA permits agreements of fixed duration.

APPENDIX B

Orders of the U.S. Court of Appeals for the Eighth Circuit

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 86-1998WM

TRANS WORLD AIRLINES, INC.,
Appellant,

—vs.—

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Appellee.

Appeal from the United States District Court
for the Western District of Missouri.

The motion of appellant filed August 7, 1986, for a stay of the memorandum and orders of the district court dated August 1, 1986, and August 8, 1986, is granted. The stay hereby granted shall remain in effect until at least August 26, 1986, and thereafter under further order of the court.

The court orders the parties to appear for oral argument at the United States Courthouse in St. Louis at one o'clock p.m. on August 26, 1986, to present arguments as to whether this stay should be continued during the appeal of the case on the merits. The case shall be expedited by the Clerk for hearing on the merits for the October 1986 session of this court in St. Paul, Minnesota.

The court sees no need for further briefs at this time unless the TWA flight attendants currently working for TWA wish to file a statement of their views on this case either as individuals or as a group, in which case short memorandums not to exceed five pages may be accepted by the Clerk of this court up to and including August 22, 1986.

August 14, 1986

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 86-1998WM

TRANS WORLD AIRLINES, INC.,

Appellant,

—vs.—

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Appellee.

Appeal from the United States District Court
for the Western District of Missouri.

Before ROSS and WOLLMAN, *Circuit Judges*,
and BRIGHT, *Senior Circuit Judge*.

ORDER OF THE COURT

This case came on to be heard before a panel of this Court on August 26, 1986, upon the petition of the plaintiff-appellant TWA for a stay of the memorandum and order filed by District Judge Sachs on August 1, 1986. This order of Judge Sachs directed TWA to implement the check-off provision of Article 24 within fourteen (14) days of that date, and implement the union membership provision within thirty (30) days of that date and granted summary judgment to the defendants, Independent Federation of Flight Attendants. On August 18, 1986, this Court entered an order staying Judge Sachs's order until August 26, 1986, when the arguments of counsel could be heard.

Upon consideration of all the documents which have been filed to date and the oral arguments, the Court now modifies the stay as follows: TWA shall follow the order of Judge Sachs as set forth in his order of August 1, 1986, with the following

exceptions: All initiation fees and dues collected from persons now working as flight attendants for TWA who were not working as flight attendants for TWA on the date of the strike, March 7, 1986, shall be placed with a corporate trustee to be agreed upon by the parties, with interest, pending the final resolution of this case by this Court after the case is heard on its merits at the October 1986 session of this Court in St. Paul. If the parties cannot agree on a corporate trustee, Judge Sachs shall appoint such trustee.

Hearing of this case shall be set for Wednesday, October 15, 1986, in St. Paul, Minnesota, before this panel of the Court.

Additional briefs not to exceed 25 pages from each of the litigants will be accepted by the Court pursuant to scheduling arranged by the clerk's office. An amicus brief not to exceed 20 pages from the "new hires" among the current flight attendants will be permitted.

DATED this 26th Day of August, 1986.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 86-1998

TRANS WORLD AIRLINES, INC.,

Appellant,

—v.—

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Appellee.

Appeal from the United States District Court
for the Western District of Missouri.

Filed: September 25, 1986

ORDER

The appellee is directed to respond to the motion of Glenda Lopez-Bruner, et al. on or before September 29, 1986. Such response shall be filed with the clerk of this court with duplicate copies delivered to the following judges:

The Hon. Donald P. Lay
Chief Judge
P.O. Box 75098
St. Paul, MN 55175

The Hon. Myron H. Bright
U.S. Senior Circuit Judge
P.O. Box 2707
Fargo, ND 58108

The Hon. Roger L. Wollman
U.S. Circuit Judge
212 Federal Building
Pierre, SD 57501

Pending ruling on the pending motion, TWA shall pay any moneys checked off from the cross-over employees to the same corporate trustee as selected under this court's order of August 26, 1986, to be held at interest and in escrow until the further order of this court.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 86-1998WM

TRANS WORLD AIRLINES, INC.,

Appellant,

—vs.—

THE INTERNATIONAL FEDERATION OF FLIGHT ATTENDANTS,

Appellee.

Appeal from the United States District Court
for the Western District of Missouri.

In order to maintain the status quo until this Court is able to consider the various pending motions for modification or clarification of this Court's partial stay order of August 26, 1986, the Court directs that any cross-over employee who claims to have resigned from the union, instead of paying dues to the union, may pay current or delinquent dues to the corporate trustee serving under this Court's order of August 26, 1986, to be held at interest and in escrow by said trustee, subject to the further order and direction of this Court.

Such payment, by any such cross-over employee, shall be deemed payment of union dues by said employee pursuant to the preexisting collective bargaining agreement between TWA and IFFA for the purpose of avoiding the employee's discharge for nonpayment of dues—provided such payment or payments be timely made.

This order remains in force until the hearing on said motions at 8:30 a.m., Wednesday, October 15, 1986, in St. Paul, Minnesota, and, unless specifically extended, will expire at 5:00 p.m. that date.

The emergency partial stays embodied in this Court's order of September 25, 1986 (payments of checked-off dues of cross-over employees) will also expire at 5:00 p.m., October 15, 1986, unless specifically extended by the Court.

October 7, 1986

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 86-1998WM

TRANS WORLD AIRLINES, INC.,

Appellant,

—vs.—

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Appellee.

Appeal from the United States District Court
for the Western District of Missouri.

Before, LAY, *Chief Judge*, BRIGHT, *Senior Circuit Judge*, and WOLLMAN, *Circuit Judge*.

ORDER OF THE COURT

Upon hearing and considering the pending motions for modification or clarifications of the partial stay order of August 26, 1986, it is ordered that said motions are denied.

This court has this day heard the parties' arguments on the merits of the appeal by Trans World Airlines, Inc. and has the appeal under consideration. Pending disposition of the merits, the majority of the court is of the view that the partial stay order dated August 26, 1986 should be and is herewith dissolved forthwith.

The corporate trustee is ordered and directed forthwith to pay to The Independent Federation of Flight Attendants (Union) any funds from Trans World Airlines employees now held in escrow or which may be received by the trustee to hold in escrow pursuant to this court's partial stay orders of August

26, September 25, and October 7, 1986. Pending further order of this court, all union dues and agency fees of flight attendants of Trans World Airlines shall be paid directly to the Union.

This court will endeavor to file its opinion on the merits in not more than thirty days from this date.

A true copy.

ATTEST:

/s/ ROBERT D. ST. [ILLEGIBLE]

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

October 15, 1986

No. 86-1998

TRANS WORLD AIRLINES, INC.,

Appellant,

—v.—

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Appellee,

GLENDA LOPEZ-BRUNER, *et al.*,

Intervenor/Appellant.

Appeal from the United States District Court
for the Western District of Missouri.

Submitted: October 15, 1986

Filed: January 14, 1987

Before LAY, *Chief Judge*, BRIGHT, *Senior Circuit Judge*, and WOLLMAN, *Circuit Judge*.

ORDER

The motion of Glenda Lopez-Bruner, *et al.*, to intervene was heard by a panel of this Court on October 15, 1986. Movants, as representatives of that class of Trans World Airlines, Inc. (TWA) employees who have resigned their membership in the Independent Federation of Flight Attendants and crossed the picket lines to continue working for TWA, seek leave only to intervene to secure a modification of this Court's August 26, 1986, partial stay order. They do not seek leave to intervene on the merits of TWA's appeal. This Court denied their motion to modify the partial stay order by order dated October 15, 1986, and in that same order dissolved the August 26, 1986, stay order pending disposition of this case on the merits. We

permitted Glenda Lopez-Bruner, *et al.*, to appear and argue on the stay order. Thus, their petition for intervention has been recognized and they are granted leave to intervene for such limited purpose. Those persons, however, are not recognized as intervenors on the merits of the appeal.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX C

Memorandum and Orders of the U.S. District Court for the Western District of Missouri

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

No. 86-6059-CV-SJ-6

TRANS WORLD AIRLINES,

Plaintiff,

—v.—

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Defendant.

MEMORANDUM AND ORDER

Trans World Airlines (TWA) has filed suit to determine whether the union security clause in a collective bargaining agreement survives into the self-help period after an impasse in bargaining over other issues. The Flight Attendants' Union (IFFA) counterclaims for a ruling that Article 24, the union security clause, remains in force, including provisions for check-off of union dues and a requirement that new hires join the union. Both parties have moved for summary judgment and both agree the court is presented with an issue of law, based on undisputed facts. The motions were argued July 12, 1986.

The issue raises two questions: (1) Did Article 28, the duration provision of the contract, cause parts of the contract that were not the subject of bargaining to continue in effect, or did notice of certain intended changes trigger a total termination of the agreement? (2) If the contract provides for total termination upon impasse over proposals for limited changes, is such a duration provision lawful under the Railway Labor Act?

The arguments of the parties focus on the second question. It would ordinarily be more appropriate to consider first the narrower question, largely confined to the rather unusual language of this agreement, instead of dealing with a statutory question having major import to labor relations in the airline industry. Both questions are sufficiently difficult, however, to justify reasoning in the alternative, and the parties emphasize the second question in their briefing and argument. The court will therefore consider the questions in reverse order, and will initially make the assumption that the contract provided for total termination of contract obligations upon any impasse in bargaining, and that a lawful impasse has occurred.[1]

I

Forceful language in a Supreme Court opinion supports the IFFA contention that the Railway Labor Act contemplates (1) continuity in the relationships between employers and representatives of employees, and (2) the development of carefully crafted contractual provisions that will become almost permanent fixtures governing certain phases of the employer-employee relation. *Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees v. Florida East Coast Railway*, 384 U.S. 238 (1966) (*FEC*).

The controversy in the *FEC* case and in the present case centers on § 2 Seventh of the Act (45 U.S.C. § 152 Seventh) which provides that "no carrier shall change the rates of pay, rules, or working conditions of its employees, as a class, as

1 In companion litigation, IFFA contends TWA did not bargain in good faith and had no right to engage in self-help (reduction of wages of flight attendants, etc.). That litigation remains at the discovery stage, and is not ready for trial. The court has previously denied a temporary restraining order against TWA's exercise of self-help. All parties are content that, for present purposes, I treat the impasse as a lawful one, as I did in ruling the motion for a restraining order.

embodied in agreements except in the manner prescribed in such agreements or in Section 6 of this Act." Section 6 (45 U.S.C. § 156) requires at least thirty days' written notice of intended changes in agreements, and thereafter a protracted negotiating period before the parties are released to make such changes or otherwise engage in self-help.

Although an air or rail carrier may, after impasse in bargaining over proposed changes and release from further bargaining duties by the National Mediation Board, face a strike and may continue its operations with a substantially different labor force, the Court declared in *FEC*:

> Any power to change or revise the basic collective agreement must be closely confined and supervised. These collective bargaining agreements are the product of years of struggle and negotiation; they represent the rules governing the community of striking employees and the carrier. That community is not destroyed by the strike, as the strike represents only an interruption in the continuity of the relationship. Were a strike to be the occasion for a carrier to tear up and annul, so to speak, the entire collective bargaining agreement, labor-management relations would revert to the jungle. A carrier could then use the occasion of a strike over a simple wage and hour dispute to make sweeping changes in its work-rules so as to permit operation on terms which could not conceivably have been obtained through negotiation. Having made such changes, a carrier might well have little incentive to reach a settlement of the dispute that led to the strike. It might indeed have strong reason to prolong the strike and even break the union. The temptation might be strong to precipitate a strike in order to permit the carrier to abrogate the entire collective bargaining agreement on terms most favorable to it. The processes of bargaining and mediation called for by the Act would indeed become a sham if a carrier could unilaterally achieve what the Act requires be done by the other orderly procedures.

384 U.S. at 246-47.

The opinion of Justice Douglas continued: "While the carrier has the duty to make all reasonable efforts to continue its operations during a strike, its power to make new terms and conditions governing the new labor force is strictly confined, if the spirit of the Railway Labor Act is to be honored." 384 U.S. at 247. In footnote 7, the Court observed that a temporary deviation from the agreement during a strike might be authorized as to changes sought during negotiation or permitted by a district court as being essential to operations, but at the conclusion of the strike (presumably by agreement) "the terms of the earlier collective bargaining agreement, except as modified by any new agreement of the parties, would be fully in force." *Id.*

No member of the Court disagreed with this language, but Justice White dissented from the conclusion that a district court could authorize changes in the agreement during the strike, where such changes had not been the subject of bargaining. 384 U.S. at 249. He described the Court's ruling as one construing § 2 Seventh as forbidding the carrier "to make any changes in the contract other than those on which bargaining has taken place . . ." *Id.*

TWA offers two rationales for distinguishing *FEC*. First, it contends the *FEC* ruling itself simply deals with the district courts' power, during a strike, to approve a change in collective bargaining provisions not addressed at the negotiating table. The message to those courts to impose a high burden on a carrier seeking approval of contemplated changes during the impasse period seems to have been only a subordinate theme in the opinion. It is difficult to avoid the conclusion that the principal message of the decision is that a carrier acting on its own is forbidden by law to make "changes in the contract other than those on which bargaining has taken place." 384 U.S. at 249 (White, J., dissenting).[2]

---

2 The syllabus to the opinion identifies one of the holdings with the previously quoted language that "if the spirit of the Railway Labor Act is to be honored" a carrier's "power to make new terms and conditions governing

TWA's second rationale for distinguishing *FEC* centers on its observation that *FEC* involved a railroad collective bargaining agreement which had no expiration date, and was therefore a continuing contractual commitment subject to reopening of particular provisions. TWA contends there is implicit reference to the Court's understanding that the contract itself had not terminated, in that the Court repeatedly refers to "existing" agreements.

The Ninth Circuit seems to be the only appellate authority that has considered the ruling in *FEC* and nevertheless permitted what was deemed to be a termination clause to free a carrier from all provisions of a collective bargaining agreement after an impasse, including those which had not been the subject of a § 6 notice. *International Association of Machinists and Aerospace Workers v. Reeve Aleutian Airways, Inc.*, 469 F.2d 990 (9th Cir. 1972), *aff'g* 330 F.Supp. 332 (D.Alaska 1971), *cert. denied*, 411 U.S. 982 (1973). The *Reeve* ruling is rather summary, however, simply noting that *FEC* was distinguishable without considering its rationale. Nonetheless, this court might feel bound to follow *Reeve* as a controlling appellate precedent if it had not been questioned by another appellate court. See *EEOC v. United Air Lines*, 755 F.2d 94, 98 (7th Cir. 1985) (Posner, J.). While I am not convinced that Judge Posner's criticism of *Reeve* is significantly more soundly reasoned than the *Reeve* opinion itself,[3] the incipient conflict between the Seventh and Ninth Circuits, and the absence of

[the replacement] labor force [must be] strictly confined." While not the work of the Court, a syllabus is occasionally useful. *The Parent Association of Andrew Jackson High School v. Ambach*, 598 F.2d 705, 716 n.9 (2d Cir. 1979).

3 Judge Posner concluded that any attempt to harmonize *FEC* and *Reeve* results in a paradox in that the contracts common to the railroad industry contain no termination date, and may therefore be terminated at will, but that under *FEC* such contracts would give the union greater protection than even a ten year fixed term contract as defined in *Reeve*. 755 F.2d at 98. My understanding of the railroad industry practice, however, is that the contracts are continuing agreements, with specific provisions modifiable pursuant to the Act, rather than terminable at will agreements. The

Eighth Circuit appellate precedent, require that I undertake a more detailed analysis of the issue. I am not persuaded by TWA's contention that *Reeve* should be afforded controlling precedential effect because certiorari was denied.[4]

TWA concedes that it is baffled by *FEC*'s vigorous language regarding what the Act itself requires, but argues that it should be disregarded as dicta. The holding in *FEC* is admittedly concealed in strong language without an explicit statement of conclusions. It would have been quite simple, however, to avoid giving the eloquent lecture about the purposes of the Act if the Court has viewed the agreement between the parties as the controlling factor. Moreover, even if properly labelled as dicta, it is carefully considered dicta that a single trial judge should almost always treat as binding. That has been my practice, *Powell v. Kovac's, Inc.*, 596 F.Supp. 1520, 1524 (W.D.Mo. 1984), and I believe it to be standard. *See, e.g., United States v. Kahn*, 251 F.Supp. 702, 708 (S.D.N.Y. 1966). The pertinent language is not a casual remark or "very brief

common law principles to which Judge Posner refers yield to a different statutory intent. There is no paradox in concluding that a continuing agreement affords more protection than a fixed term agreement. The fact remains, however, that the Posner opinion senses an inconsistency between *Reeve* and the recited "logic" of *FEC*.

4 One rare indication that the Supreme Court recognizes that its denials of certiorari might legitimately be occasionally given some weight is in a case where the denial was flagged by dissent. *United States v. Kras*, 409 U.S. 434, 443 (1973). The conventional attitude almost invariably expressed is that of Justice Marshall in his *Kras* dissent. 409 U.S. at 461. *See* Linzer, "The Meaning of Certiorari Denials," 79 Col. L. Rev. 1227 (1979). I decline to speculate that the reason for denial of certiorari in *Reeve* was agreement on the merits with that ruling. Docket conditions might have been a factor, or doubt that *Reeve* would become a significant precedent. While it looms large in this litigation, more than a dozen years passed before the courts began to find it necessary to compare it with *FEC*. During that period it seems to have been relied on in only one appellate decision, *IAM v. Northeast Airlines*, 536 F.2d 975, 978 n.2 (1st Cir.), *cert. denied*, 429 U.S. 961 (1976), and TWA cites no law review treatment or other identification of the case as a significant limitation on the general policy favoring continuity in labor relations under the Railway Labor Act. The Court guessed correctly if it saw no urgency in dealing with *Reeve*.

statement," but the major thrust of the *FEC* opinion. *Cf. Anheuser-Busch, Inc. v. Stroh Brewery Co.*, 750 F.2d 631, 636 (8th Cir. 1984) (indicating that a casual remark in an opinion of another circuit may be unpersuasive).

With only slightly shifted emphasis, TWA contends that neither side in *FEC* even argued that the contract had expired, and that the entire opinion is therefore premised on an assumption of an underlying, existing contract. This contention may well be true, but it in no way undermines the binding nature of the Court's holdings with respect to the policies of the Act. Those policies are not altered by language in contracts which are necessarily subservient to it.

As stated in *FEC*, the Act seeks to foster a "community" between labor and management and to maintain contract provisions established after "years of struggle and negotiation." 384 U.S. at 246-47. Allowing the regulated parties to establish comprehensive termination dates in their contracts would seemingly flout these purposes. Such provisions would have a greater tendency to sever the community and destroy the long established contractual provisions than would normally be expected under the procedures of § 6. As a matter of statutory construction, the lesson of *FEC* appears to confine the parties to prescribing renegotiation provisions in their agreements under § 2 Seventh that are consistent with § 6 of the Act. The statutory right to provide alternate procedures by contract which are not identical with those provided in § 6 allows the parties to vary the notice periods and the like, but prevents them from lawfully causing contracts to completely self-destruct simply upon notice of specified proposed changes.[5]

This reading of the implications of the *FEC* decision flows naturally from the language of the opinion, which is otherwise hard to explain. It is not novel with this court. In the only

5 While it is theoretically possible, under this interpretation of the Act, to serve notice that a party desires to change every provision of a contract, it may be assumed that this would be so unlikely and would present such difficulties that parties would rarely if ever adopt this technique. Such a notice might, moreover, place a party in jeopardy of being found not to be bargaining with a good faith intention to reach agreement.

other pertinent decision from within the Eighth Circuit an identical reading of *FEC* occurred, in a thoughtful opinion by Judge Larson. *Cox v. Northwest Airlines, Inc.*, 319 F.Supp. 92 (D.Minn. 1974). *See also ALPA v. United Air Lines*, 614 F.Supp. 1020, 1024 (N.D.Ill. 1985) (appeal pending) (residual provisions that were not renegotiated survive despite existence of a duration clause in the contract that is arguably a termination provision, 614 F.Supp. at 1041).[6] An appellate decision assuming the *FEC* decision applies in the airline industry in its permission for limited self-help is *ALPA v. CAB*, 502 F.2d 453, 457 n.12 (D.C.Cir. 1974), *cert. denied*, 420 U.S. 972 (1975).

TWA further contends that a rule requiring continuing contracts, under the doctrine of *FEC*, will conflict with normal practice in the airline industry. A source deserving of respect has noted that airline bargaining practices have developed differently from those that are customary among railroads. Burgoon, "Mediation Under the Railway Labor Act," a chapter in *The Railway Labor Act at Fifty*, (G.P.O. 1977). In particular, it is said that airline contracts "are not continuing instruments. They expire in their entirety on the date set forth in the agreement."[7] *Id.* at 92. The Burgoon article lends some support to Justice Douglas' ruling in *FEC*, however, in its discussion of the original intent and essential purpose of the Railway Labor Act. The author observes:

> Another among the railroad industry practices which influenced the provisions of the Railway Labor Act was that of negotiating open-end collective bargaining agreements. Railroad agreements do not expire on a given date but remain in effect until one party or the other proposes

6 It may be observed that although Judge Bua did not refer to the *EEOC* decision in his *ALPA* opinion, he was the district judge in that case. When he applied *FEC* principles in *ALPA* to overcome contract language that was quite similar to that in *Reeve*, Judge Bua took the same path that I do in this portion of my ruling.

7 As will be discussed further, in the recent *EEOC* case Judge Posner noted one airline contract that has no such termination clause, and I find another in this case. The contract in *Reeve* was assumed to provide a termination date, but the language does not unmistakably prevent partial survival of contract terms.

> modification of certain of the agreement's provisions, whereupon negotiations take place on the specific issues raised and, when agreement is reached, the contract is modified accordingly. The earliest railroad agreements known, dating back to the last quarter of the 19th Century, were of this open-end type and the practice continues throughout the industry to the present time . . . Section 6 of the Railway Labor Act provides for 'thirty days written notice of an intended change in agreements affecting rates of pay, rules or working conditions . . .' thus accommodating to the open-end contracts.

Id. at 92. It seems, therefore, that Justice Douglas accurately caught the spirit of the Act in his *FEC* opinion. It may fairly be concluded that the right to make agreements prescribing the manner of changing contract terms, as set forth in § 2 Seventh, was intended to supplement rather than displace § 6, and cannot be construed to permit parties to "opt out" of the basic procedures of the Act. A termination provision avoiding renegotiation of undesired terms conflicts with the Act, as described in *FEC*, and has not been shown to have been within the contemplation of Congress when it enacted the language in question in 1934. Although Burgoon says such contracts demonstrate the "flexibility" of the Act, *Id.*, the Supreme Court ruling in *FEC* shows the practice to be inconsistent with the basic mandates of §§ 2 Seventh and 6 of the legislation.

TWA has cited a number of cases that give effect to termination clauses in airline labor contracts. Several predate the Supreme Court ruling in *FEC* or are from the Ninth Circuit and its constituent districts, where one would expect the panel opinion in *Reeve* to prevail. The only airline cases that carefully consider the teaching in *FEC* are *Cox* and *EEOC*, both of which lend some support to my ruling here.

A final TWA contention is that it cannot collect dues for the union without an agreement with the union, and that the Railway Labor Act simply freezes certain rules and conditions of employment embodied in a prior agreement but does not

extend the agreement. As stated in *EEOC*, however, "realistically, the contract remains in force." 755 F.2d at 99.

It is concluded that the duration clause of the TWA-IFFA contract, if construed as TWA urges, would violate the Railway Labor Act. The portions of the contract not subjected to renegotiation still exist. The union security clause remains presently binding on TWA since the only issue dealt with in bargaining was the use of the check-off during a strike.[8]

II

In *EEOC* v. *United Air Lines, Inc.*, 755 F.2d 94 (7th Cir. 1985), Judge Posner avoided a ruling flatly disapproving of the *Reeve* decision, 469 F.2d 993, by construing the duration clause in the airline contract before him as creating an amendable rather than a terminable contract. The language under consideration specified that the agreement "shall remain in full force and effect through November 1, 1978, and thereafter shall be subject to change by service of a notice as provided for in Section 6" of the Railway Labor Act. 755 F.2d at 97. Although the district court had concluded that the contract had terminated in its entirety, the Seventh Circuit disagreed. The appellate ruling was that "the service of the notice is the mode of amendment, *implying* that what is not sought to be changed continues in effect. November 1 really is not a termination date at all; it is the date before which no changes can be made." *Id.* (Emphasis added.)

The present contract contains a duration clause providing:

> Except as otherwise specified in this Agreement, this entire Agreement shall be effective August 1, 1981 [and] shall remain in effect until July 31, 1984, and thereafter

---

8 The parties will recognize that I express no view of the issues of public policy presented by this case. It is arguable that the airline industry's labor-relations legislation should be harmonized with the deregulation of the airline industry in other respects. *See IAM* v. *TWA*, 601 F.Supp. 1363, 1372 n.11 (W.D.Mo. 1985). Removal of the industry from Railway Labor Act coverage and substitution of coverage by the National Labor Relations Act may well be appropriate. In the meantime, the present parties would be well advised to resume negotiating to put their mutilated collective bargaining agreement in order.

> shall renew itself without change for yearly periods unless written notice of intended change is served in accordance with Section 6 . . . of the Railway Labor Act by either party hereto, at least 90 days prior to the renewal date in each year.

This language shows that a *total* renewal occurs if no notice is received. As in *EEOC*, there is no express language terminating the agreement in the event of a notice of intended change. While the notice prevents total renewal, nothing in the wording prevents partial renewal. On the contrary, partial renewal seems implied in the language preventing renewal of the "entire" agreement.[9] The reference to the "entire" contract is useless, by the TWA interpretation, and merely serves as emphasis. It is more likely that it has an operative purpose, distinguishing between all or parts of the agreement. The language appears to create an amendable contract, as in *EEOC*, with prospective changes limited to the subject matter of the notice.

Under the National Labor Relations Act, contractual provisions authorizing notices seeking modifications of contracts have sometimes been deemed to cause terminations and have sometimes been treated as authority for amendments only. *Kaufman and Broad Home Systems, Inc. v. Intern. Broth. of Firemen and Oilers*, 607 F.2d 1104 (5th Cir. 1979). Consistent with the policies of the Railway Labor Act, as enunciated in *FEC*, the contract at bar should be read harmoniously with that Act so as to create continuing obligations, except as changed in accordance with § 6 or with supplemental agreements refining the prescribed procedures.

If extrinsic evidence is admissible or helpful, IFFA has supplied it. The chief legal counsel of IFFA, who has served in that capacity for more than nine years, stated by affidavit that TWA officials have never prior to this controversy referred to

9 While pleaders are often relieved from careless, unintended negative pregnants (2A *Moore's Federal Practice* § 8.24), one would suppose that the parties adopting language designed for long-term use can generally be held more precisely to what they say and the implications of what they refrain from saying. This is not the kind of clause where the parties are likely to have planted intentional ambiguities in order to paper over differences.

any "expiration date" of their collective bargaining agreements, or spoken in terms of the contracts "expiring" or "terminating." Such officials and representatives did, however, refer to "amendable dates" and referred to the agreements as "becoming amendable." Affidavit of William A. Jolley, July 2, 1986, page 2. No contrary evidence has been offered.

The contract in question is amendable in accordance with its provisions and the Railway Labor Act. It does not wholly terminate, either automatically or upon service of notice of a limited number of intended changes. The union security provision continues in effect, under the circumstances presented by the cross motions for summary judgment. It is therefore

ORDERED that plaintiff's motion for summary judgment be DENIED and defendant's motion for summary judgment be GRANTED. The Clerk shall enter judgment in favor of defendant.

Plaintiff shall implement the check-off provision of Article 24 within fourteen (14) days of this date, and shall implement the union membership provision within thirty (30) days of this date. If notice of appeal is filed, no stay pending appeal will issue from this court.

The court retains jurisdiction to modify or enforce this order.

/s/ HOWARD F. SACHS
Howard F. Sachs
United States District Judge

DATED: August 1, 1986.

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

No. 86-6059-CV-SJ-6

TRANS WORLD AIRLINES,

Plaintiff,

—v.—

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Defendant.

MEMORANDUM TO COUNSEL AND ORDER DENYING REQUEST FOR FINDINGS AND CONCLUSIONS REGARDING STAY

A formal statement of findings and conclusions on the question of granting a stay pending appeal is deemed inappropriate because there is no record other than the argument of counsel on which to rely. Defendant's motion is therefore DENIED. A brief statement of my rationale may, however, be useful.

TWA's likelihood of success on appeal was not a dispositive factor.

The balance of harm and the public interest seem to favor IFFA over TWA. As best I can determine, relying on statements of counsel, as at page 73 of the transcript of the summary judgment argument on July 12, 1986, IFFA is approaching the stage of being broken financially by the position taken by TWA. A bond will not pay current bills. Enforcement of the union security clause will cause TWA no harm other than facing a live opponent. Working flight attendants will not be unduly harmed by being required to comply with union security provisions long applicable to such employees of TWA.

The union's statutory role as representative of all member and nonmember flight attendants appears not to be questioned.

If TWA's decision to cancel the union security clause is given continuing effect, the result may well be that envisioned by Justice Douglas in his *FEC* opinion. 384 U.S. at 246-7.* Thus the public interest would not, in my judgment, favor TWA.

/s/ HOWARD F. SACHS
Howard F. Sachs
United States District Judge

DATED: August 8, 1986.

---

* To avoid misunderstanding, I repeat what I said at oral argument. I do not believe the scenario is as bad as the "worst case" suggested by Justice Douglas, in that TWA's bargaining was over important financial issues.

APPENDIX D

Text of Statutes Involved

RAILWAY LABOR ACT

45 U.S.C. § 152. General duties

First. Duty of carriers and employees to settle disputes

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

* * *

Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations,

or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Fifth. Agreements to join or not to join labor organizations forbidden

No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

* * *

Seventh. Change in pay, rules, or working conditions contrary to agreement or to section 156 forbidden

No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

* * *

Eleventh. Union security agreements; check-off

Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided,* That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided,* That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

* * *

(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended.

§ 153. National Railroad Adjustment Board

* * *

Second. System, group, or regional boards: establishment by voluntary agreement; special adjustment boards: establishment, composition, designation of representatives by Mediation Board, neutral member, compensation, quorum, finality and enforcement of awards

Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the

carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon

both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

* * *

§ 155. Functions of Mediation Board

First. Disputes within jurisdiction of Mediation Board

The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the

rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

* * *

§ 156. Procedure in changing rates of pay, rules, and working conditions

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference hereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

* * *

§ 160. Emergency board

If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this chapter and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: *Provided, however,* That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

There is hereby authorized to be appropriated such sums as may be necessary for the expenses of such board, including the compensation and the necessary traveling expenses and expenses actually incurred for subsistance, of the members of the board. All expenditures of the board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose.

* * *

§ 184. System, group, or regional boards of adjustment

The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on April 10, 1936 before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this subchapter, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 153 of this title.

Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in this chapter shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of this subchapter, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarly limited jurisdiction.

NATIONAL LABOR RELATIONS ACT

29 U.S.C. § 158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such

agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * *

LABOR MANAGEMENT RELATIONS ACT

29 U.S.C. § 186. Restrictions on financial transactions

Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce;

* * *

Request, demand, etc., for money or other thing of value

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

* * *

(c) Exceptions

The provisions of this section shall not be applicable

* * *

(4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner;

* * *

APPENDIX E

Excerpts from the 1981-1984 Collective Bargaining Agreement Between TWA and IFFA

AGREEMENT between TRANS WORLD AIRLINES, INC. and the FLIGHT ATTENDANTS in the service of TRANS WORLD AIRLINES, INC. as represented by THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS

This agreement is made and entered into in accordance with the provisions of the Railway Labor Act, as amended, by and between TRANS WORLD AIRLINES, INC., hereinafter called the "Company" and the Airline Flight Attendants in the service of Trans World Airlines, Inc., as represented by the INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS, hereinafter called the "Union."

It is hereby mutually agreed:

ARTICLE 1

RECOGNITION

In accordance with the certification (R-4687) made by the National Mediation Board on April 1, 1977, the Company hereby recognizes the Independent Federation of Flight Attendants (IFFA), as the duly designated and authorized representative of the Flight Attendants in the employ of the Company for the purposes of the Railway Labor Act, as amended.

SCOPE

All TWA flights flown by the Company which require Flight Attendants on board the aircraft shall be operated in accordance with the provisions of the current Working Agreement, and all Flight Attendants employed by the Company shall be subject to the provisions of the current Working Agreement.

* * *

ARTICLE 4

EXPENSES

(A) Domestic Operations

(1) Effective March 5, 1983, a Flight Attendant's expense allowance while engaged in operations away from his/her base station shall be one dollar and seventy-five cents ($1.75) per hour for each hour or fraction thereof while away from base station.

* * *

ARTICLE 17

SYSTEM BOARDS OF ADJUSTMENT

(A) In compliance with Section 204, Title II, of the Railway Labor Act, as amended, there is hereby established System Boards of Adjustment for the purpose of adjusting and deciding disputes which may arise under the terms of the Flight Attendants' Agreement and which are properly submitted to it after exhausting the procedures for settling disputes as set forth in Article 16.

(B) Four (4) Member Board

(1) Composition

(a) The Boards shall consist of four (4) members, two (2) of whom shall be selected and appointed by the Union and two (2) by the Company. Such appointees shall be known as "System Board members." Board Members who are employees of the Company may be granted necessary leaves of absence for the performance of their duties as Board members.

(b) The four (4) members shall serve for one (1) year from the date of their appointment or until their successors have been duly appointed. Vacancies in the Company membership of the Board shall be filled by appointment of the Company. Vacancies in the Union membership of the Board shall be filled by appointment of the Union.

(2) Chairperson

(a) The office of Chairperson of the Board will alternate January 1 of each year between the Company members of the Board and the Union members of the Board. A Union member of the Board will act as Chairperson during even numbered years and a Company member of the Board will act as Chairperson during odd numbered years.

(b) When a Union member is Chairperson, a Company member shall be Vice Chairperson, and vice versa. The Chairperson, or in his/her absence the Vice Chairperson, shall preside at meetings of the Board and at hearings and shall have a vote in connection with all actions taken by the Board.

(3) Submissions

(a) All disputes properly referred to the Board for consideration shall be addressed to the Chairperson. Seven copies of each petition, including all papers and exhibits in connection therewith, shall be forwarded to the Chairperson who shall promptly transmit one copy thereof to each member of the Board, one copy to the Director–Labor Relations, Flight, and one copy to the Vice President–In-Flight Services.

(b) Each case submitted shall show:

1) Question or questions at issue
2) Statement of facts
3) Position of employee or employees
4) Position of Company
5) Election, if appropriate, to by-pass four (4) member Board and proceed directly to five (5) member Board or to proceed directly to a Discharge Board.

(c) When possible, joint submissions should be made, but if the parties are unable to agree upon a joint submission, then either party may submit the dispute and its position to the Board. No matter shall be considered by the Board which has not first been handled in accordance with the appeals provisions of the Flight Attendants' Agreement.

(4) Mandatory Meetings

The Board shall convene no less than once every sixty (60) days provided that at such times there are cases which have been submitted to the Board for consideration.

(5) Scheduling of Disputes

Upon receipt of notice of a submission of a dispute, the Vice President-Labor Relations or his/her designee and the Union President or his/her designee shall determine the date, time of day and the place for convening the Board, which shall be no later than the next regular meeting of the Board. The Board shall continue in session until all matters before it have been considered and decided.

(6) Emergency Meetings

If at least two (2) members of the Board consider the matter of sufficient urgency and importance then at such earlier date, time and place as the Vice President-Labor Relations or his/her designee and the Union President or his/her designee shall agree upon, but not more than fifteen (15) days after the request for an earlier meeting is made, the Board shall convene. The Chairperson shall give the necessary notices in writing of such meeting of the Board members and to the parties to the dispute.

(7) Decisions

(a) A majority vote of all members of the Board shall be competent to make a decision.

(b) A written decision shall be rendered by the Board prior to the session being adjourned for the day.

(c) Decisions of the Board in all cases properly referable to it shall be final and binding upon the parties hereto.

(d) The Chairperson shall notify the parties to the dispute of the decision of the Board within five (5) days of the close of the hearing.

(C) Five (5) Member Board-Arbitration

(1) Composition

The five (5) member Board shall be composed of the four (4) member Board as specified in (B) of this Article, sitting with a neutral referee.

(2) Referee Panel

(a) The neutral referee shall be selected for each case from a panel of seven (7) neutral referees. In selecting the referee, the parties will employ the alternate strike method.

(b) In the establishment of the panel, the parties will each select three (3) members and the seventh member shall be determined by mutual agreement. The panel will be established within thirty (30) work days of the signing of this agreement. Thereafter, neutral panel members shall be replaced only by mutual consent of the parties.

(c) In the event no mutual agreement can be reached in regard to the permanent replacement of a neutral panel member, or in the event of the temporary unavailability of a neutral panel member after the parties have employed an alternate strike method, either the Union or the Company may petition the National Mediation Board for the appointment of a neutral referee.

(3) Intent to Arbitrate

(a) When a deadlock occurs in a case properly submit-

ted to the four (4) member Board and either the Company or the Union elects to break such deadlock, the deadlock shall be broken by the five (5) member Board. The party that elects to break the deadlock shall notify the other party, in writing, within thirty (30) work days of the date of the deadlock decision.

(b) In case neither the Company nor the Union notifies the System Board Chairperson of an intent to arbitrate the issue within thirty (30) work days after the four (4) member Board deadlocks, the matter in question shall be deemed by all parties concerned to be ended and no action thereon shall be taken by either party.

(c) When either the Union or the Company elects to by-pass the four (4) member Board the dispute shall be resolved by the five (5) member Board. The party that elects to by-pass the four (4) member Board shall notify the other party in writing, within thirty (30) work days of the date of the written Step II decision.

(4) Selection of Referee

Within ten (10) work days, after the appeal to the five (5) member Board as specified above, the Company and the Union shall select a neutral referee in the manner herein provided, to sit with the Board and settle the dispute.

(5) Hearing Time Limits

The neutral referee shall set a date for hearing which will be scheduled no later than twenty (20) work days after his/her appointment.

(6) Decisions

(a) The five (5) member Board shall consider the dispute pending before it, and a majority vote of the Board shall be final, binding and conclusive upon the Company and the Union and anyone they may represent having an interest in the dispute.

(b) The decision by the five (5) member Board shall be rendered within twenty (20) work days after the close of the hearing.

(D) Discharge/Discipline Board of Adjustment

(1) Application

Notwithstanding any provisions in this Agreement to the contrary, the Union may elect to appeal any discharge/discipline grievance to the four (4) member Board, the five (5) member Board or the Discharge/Discipline Boards.

(2) Purpose

The purpose of the Discharge/Discipline Board of Adjustment shall be to expedite the handling of discharge/discipline grievances.

(3) Location

(a) Discharge/Discipline Boards of Adjustment are hereby established in New York for those domiciles in the Eastern Time Zone; Los Angeles for those domiciles in the Pacific Time Zone; and Kansas City for those domiciles in the Central Time Zone.

(b) Hearings will be held off Company premises at a location in the City where the Board is established unless otherwise mutually agreed.

The jurisdiction of each Board shall be limited to discharge/discipline grievance cases.

(4) Composition

Each Discharge/Discipline Board shall be composed of one (1) member appointed by the Union, one (1) member appointed by the Company, and a neutral referee who shall serve as Chairperson.

(5) Referee Panel

(a) Within twenty (20) work days after the signing of this Agreement, a panel of five (5) neutral referees shall be established for each time zone specified in (3) above. In each such time zone the Union shall select two (2) neutral referees, and the Company shall select two (2) neutral referees. The fifth neutral referee for each time zone shall be selected by mutual agreement.

(b) The neutral referee engaged for each discharge/discipline case will be determined by employing the alternate strike method.

(c) Each neutral referee chosen to be a panel member will maintain offices in the area where the Discharge/Discipline Board is established.

(d) Each party may cause the services of one (1) neutral referee per year to be terminated (except in cases already scheduled for hearing) by giving written notice to the other party and to the neutral referee.

(e) In the event no mutual agreement can be reached in regard to the permanent replacement of a neutral panel member, or in the event of the temporary unavailability of a neutral panel member after the parties have employed an alternate strike method, either the Union or the Company may petition the National Mediation Board for the appointment of a neutral referee.

(6) Except as otherwise provided herein, the rules of procedures applicable to the five (5) member Board of Adjustment in (C) above shall apply to this Discharge/Discipline Board.

(E) General

(1) Railway Labor Act

Nothing herein shall be construed to limit, restrict, or abridge the rights or privileges accorded either to the employees or to the employer, or to their duly accredited representatives, under the provisions of the Railway Labor Act, as amended, and the failure to decide a dispute under the procedure established herein shall not, therefore, serve to foreclose any subsequent rights which such law may afford or which may be established by the National Mediation Board by orders issued under such law with respect to disputes which are not decided under the procedure established herein.

(2) Jurisdiction

(a) Except as provided in (D) above, the Boards shall have jurisdiction over disputes between any employee covered by the Agreement and the Company, growing out of grievances or out of interpretation or application of any of the terms of said Agreement. The jurisdiction of the Board shall not extend to proposed changes in hours of employment, rates of compensation, or working conditions covered by existing agreements between the parties hereto.

(b) The Board shall consider any dispute properly submitted to it by the President of the Union or his/her designated representative or by the Company when such dispute has not been previously settled in accordance with the terms provided for in the Agreement.

(3) Location of Meetings

Unless otherwise provided herein or unless agreed upon to the contrary, the Board shall normally meet in New York City, New York.

(4) Representation

Employees covered by the Agreement may be represented at Board hearings by such person or persons as they may choose and designate, and the Company may be represented by such person or persons as it may choose and designate. Evidence may be presented either orally or in writing or both.

(5) Witnesses

(a) On request of individual members of the Board, the Board may, by a majority vote, or shall, at the request of either the Union representatives or the Company representatives thereon, summon any witnesses who are employed by the Company and who may be deemed necessary by the parties to the dispute or by either party, or by the Board itself, or by either group of representatives constituting the Board.

(b) The number of witnesses summoned at any one time shall not be greater than the number which can be spared from the operation without interference with the services of the Company.

(6) Stenographic Reports

When it is mutually agreed that a stenographic report is to be taken of the hearing in whole or in part, the cost will be borne equally by both parties to the dispute. In the event it is not mutually agreed that a stenographic report of the proceedings shall be taken, any written record available taken of such hearing made by either of the parties to the dispute shall be furnished to the other party upon request, provided that the cost of such written record so requested be borne equally by both parties to the dispute.

(7) Accessibility of Transcripts and Records

A copy of all transcripts, records, findings and decisions of all Boards will be filed at the conclusion of each case in a place provided by the Company, and will be accessible to all Board members and to the parties.

(8) Compensation/Expenses

(a) Each of the parties hereto will assume the compensation, travel expense, and other expenses of the Board members selected by it.

(b) Each of the parties hereto will assume the compensation, travel expense, and other expenses of the witnesses called or summoned by it.

(c) The Company and the Union Member(s), acting jointly, shall have the authority to incur such other expenses as, in their judgment, may be deemed necessary for the proper conduct of the business of the Boards, and such expense shall be borne one-half by each of the parties hereto.

(9) Free Transportation

(a) Board members shall be furnished positive free transportation over the lines of the Company for the purpose of attending meetings of the Board, to the extent permitted by law.

(b) Witnesses who are employees of the Company shall receive free positive transportation over the lines of the Company from the point of duty or assignment to the point at which they must appear as witnesses, and return, to the extent permitted by law.

(10) Non-Recrimination

It is understood and agreed that each and every Board member shall be free to discharge his/her duty in an independent manner, without fear that his/her individual relations with the Company or with the employees may be affected in any manner, by any action, taken by him/her in good faith in his/her capacity as a Board member.

* * *

ARTICLE 22

INSURANCE BENEFITS

(A) *Group Insurance*

Except as specifically amended hereunder, all provisions of the Group Insurance Plan as described in the booklet "Your TWA Group Insurance Plan for Flight Attendants" as in effect on March 4, 1983 will remain in full force and effect. The Company will continue to pay the full cost of Medical and Dental insurance premiums for each employee and his/her dependents as they are described in the Plan.

The Company agrees to amend the Group Insurance Plan for Flight Attendants, effective March 5, 1983 unless otherwise noted, as follows:

(1) Diagnostic X-ray and Laboratory

The Company will amend the Group Insurance Plan so as to increase the benefit for diagnostic x-ray and laboratory to one hundred and fifty dollars ($150) for each accident and two hundred dollars ($200) for all illnesses per calendar year.

* * * *

ARTICLE 24

UNION SECURITY

(A) Each employee now or hereafter employed in any classification covered by this Agreement shall, as a condition of continued employment in such work, within sixty (60) days following the date such employee enters training become a member of, and thereafter maintain membership in good standing (as herein defined), in the Union, except as provided otherwise herein. Such conditions shall not apply with respect to any employee to whom such membership is not available upon the same terms and conditions as are generally applicable to any other member of his classification, or with respect to any employee

to whom membership is denied or terminated for any reason other than the failure of the employee to tender the dues uniformly required of other members of his/her classification as a condition of acquiring or retaining membership.

The condition of payment shall be met if the amount due is tendered to the Secretary-Treasurer of the Union in person or is mailed to him/her within the prescribed time limits.

For the purpose of this Article, "membership in good standing in the Union" shall consist of the payment by the employee, not later than the last day of the following calendar month, of dues for each calendar month and initiation fees (not including fines and penalties), which are uniformly required of members of his/her classification as a condition of acquiring or retaining membership. The employee may have his monthly membership dues deducted from his earnings as provided in paragraph (M) of this Article, or he/she may pay his/her membership dues directly to the Union.

(B) Any employee who has not held membership in good standing with the Union at any time on or after March 6, 1947, and who was in the employ of the Company previous to such date shall not be required, as a condition of continued employment, to become a member of the Union as set out in (A) above. However, any such employee who, subsequent to the effective date of this Article and during the term of this Agreement, joins the Union, must thereafter maintain his/her membership in the Union as provided in (A) above.

(C) Notwithstanding any other provisions contained in this Agreement, if any person is transferred or promoted to a position in which she or he is not covered by this Agreement, the provisions, of (A) above shall be inoperative as to such employee. This paragraph (C) shall not apply to an employee who is transferred or promoted on a "Tem-

porary" or "Acting" basis, or any employee given special assignment, or Ambassador Club Hostess assignment, and any employee lent to a subsidiary, affiliate, or other company, who retains and continues to accrue seniority under the first paragraph of Article 10(C).

(D) When any person holding seniority under this Agreement returns to a position covered by this Agreement from lay-off, leave of absence, military leave, or a position in which she or he was not covered by this Agreement, the appropriate provisions of this Article shall, at time of return, apply in the same manner as if she or he had been actively employed in such position on the effective date of this Article.

(E) When an employee becomes delinquent by not meeting the requirements of (A) above for "membership in good standing in the Union," the following procedure shall be observed:

(1) The Secretary-Treasurer of the Union shall notify the employee by certified letter, return receipt requested, copy to the Company's Director-Labor Relations, Flight, that the employee is delinquent in the payment of dues as specified herein and accordingly is subject to discharge as an employee of the Company. Such letter shall also notify the employee that she or he make the required payment within fifteen (15) calendar days of the date of mailing of the notice or be subject to discharge under the terms of the Agreement. If the notice above is not received by the employee or is delayed in reaching such employee as the result of the employee's failure to keep both the Company and the Union informed as to her or his correct current mailing address, no extension in the time limit specified in the original notice is required.

(2) Upon the expiration of the fifteen (15) day period following the mailing of the notice in subsection (1) above, if the employee still remains delinquent the

Secretary-Treasurer of the Union may certify in writing to the Company's Director-Labor Relations, Flight, that the employee has failed to make the required payment within the fifteen (15) day grace period and is, therefore, to be discharged.

(3) Upon receipt of a certified notice in writing from the Union to the Company's Director-Labor Relations, Flight, that the employee has failed to make the required payment within the fifteen (15) day period, defined in (EX1), and therefore is to be discharged, the Company shall notify the employee in writing within twenty-four (24) hours of receipt of the Union's certified notice that he/she must make the required payment to the Union or verify to the Company previous payment made, within fifteen (15) days of the date of mailing of this notice from the Company.

Failure to verify or make such payment within this fifteen (15) day period will result in discharge.

(F) (1) If the employee discharged or to be discharged under this Article contends that she or he is not properly subject to discharge under the terms of this Article she or he may protest such action to the Trans World Airlines Flight Attendants' System Board of Adjustment provided that such protest in writing is mailed to the Board prior to the expiration of the fifteen (15) days set forth in paragraph (EX3) of this Article. If the employee fails to file a protest with the Board, his/her discharge shall be effective upon the expiration of the fifteen (15) day period as set forth in paragraph (EX3).

(2) If a protest is filed as provided in (FX1) above, such protest shall be submitted in triplicate to the Chairman of the System Board of Adjustment, with one copy to be mailed in care of the Director-Labor Relations, Flight, 605 Third Avenue, New York, New York 10158, and the other copy to be mailed in care of

the Secretary-Treasurer of the Union. The letter to the Chairman of the Board and both copies shall be sent by certified mail, return receipt requested. In the event no protest is so filed within the above time limits, the action will be considered as proper and will be final and binding upon all parties concerned. Within ten (10) days of receipt of such a protect, the System Board of Adjustment will meet and consider the dispute. A representative of the Company, a representative of the Union, and the employee affected will be allowed to present to the Board all evidence and argument which is pertinent to the issue. Prior to the expiration of the work day following such Board meeting, the Board will issue either a majority decision or a notice of deadlock. If a majority decision is issued, it will be final and binding upon all parties concerned. If a deadlock is reached, and if at the time of the deadlock the Board cannot agree upon a neutral to sit with the Board to decide the dispute, the Board will immediately request the National Mediation Board to appoint a neutral, and the Board will meet with him at the earliest opportunity and decide the dispute. At the meeting of the Board, sitting with a neutral, a representative of the Union, a representative of the Company and the employee affected will be allowed to present to the Board all evidence and argument which is pertinent to the issue. A majority decision of the Board, including the neutral, will be issued within five (5) days after such meeting and will be final and binding upon all parties concerned. The expenses and reasonable compensation of the neutral selected as provided herein shall be borne equally by the parties to this Agreement.

(3) The provisions of Article 16 shall not apply to disputes arising under this Article, and the provisions of the Agreement establishing a System Board of Adjustment shall apply to such disputes except as they are

superseded by the above provisions relating to procedures for handling disputes.

(4) During the period a protest is being handled under the provisions of this paragraph (F) and until after final award by the System Board of Adjustment the employee shall not be discharged from the Company as a result of alleged non-compliance with the terms and provisions of this agreement. If a decision is made that the employee should be discharged, the discharge shall be effected the day following the issuance of the decision. In the event a reduction in force occurs during such time as an employee's status is being protested under the provisions of this Article, such employee will be considered as having seniority under this Agreement for purposes of effecting the reduction.

(G) Time limits specified in this Article may be extended in individual cases only, and then only by written agreement between the Company and the Union.

(H) An employee discharged under the provisions of the Article shall be deemed to have been "discharged for just cause" within the meaning of the terms of the Agreement.

(I) All letters and notices provided for by this Article shall be sent by certified mail, return receipt requested. Such letters and notices or copies sent to the Union shall be addressed to the Secretary-Treasurer of the Independent Federation of Flight Attendants, 630 Third Avenue, New York, New York 10017, while those sent to the Company shall be directed to the Director-Labor Relations, Flight, 605 Third Avenue, New York, New York 10158.

(J) When an employee is discharged or resigns, she or he will be considered as a new employee for purposes of this Article if she or he returns, at a later date, to pay status under this Agreement.

(K) Both the Union and the Company, or either of them, shall have the right at any time, to notify individual employees directly of any provisions of this Agreement.

(L) When new employees are hired or transferred into classifications covered by this Agreement the Company will furnish monthly to the Union the names, classification, point of employment and payroll register number of such new employees. The Company will furnish to the Union the names, present and previous classification, point of employment and payroll register number of all employees who may transfer out of classifications covered by the Agreement; in addition, the Company will furnish to the Union the names, location, payroll register number and status of employees covered by the Agreement who terminate their payroll status for any reason, such listings will be furnished monthly.

DUES AND INITIATION FEE CHECK-OFF

(M) During the life of this Agreement the Company will deduct from the pay of each member of the Union and remit to the Union initiation fees and monthly membership dues uniformly levied in accordance with the Railway Labor Act, as amended, and the constitution and by-laws of the Union, provided such member of the Union voluntarily executes the agreed form, which is hereinafter included in this Agreement to be known as "check-off form", which shall be prepared and furnished by the Union. The Company will not be required to deduct initiation fees and monthly membership dues from the pay of employees covered by this Agreement unless (i) the Company has received a check-off form and has not received a notice of revocation thereof, and (ii) the dues for the employee conform to the applicable dues for employees of his or her classification at his or her point on the system.

ASSIGNMENT AND AUTHORIZATION FOR CHECK-OFF OF INITIATION FEES AND UNION DUES

TO: TRANS WORLD AIRLINES, INC.

I, (print name) , hereby assign to the Independent Federation of Flight Attendants, my initiation fees and Union dues from any wages earned or to be earned by me as your employee and authorize and direct you to deduct the sum of $____ initiation fees and $____ each month, which are monthly membership dues (or such monthly membership dues as may hereinafter be established by the Union as dues for employees in my present or future classification under the Agreement upon notification to the Company by the Secretary-Treasurer of the Independent Federation of Flight Attendant(s) from one pay check per month and to remit same to the Secretary-Treasurer of the Independent Federation of Flight Attendants. This assignment and authorization may be revoked by me in writing after the expiration of one (1) year from this date, or upon the termination date of the applicable collective bargaining agreement between Trans World Airlines, Inc., and the Union in effect at the time this is signed, whichever occurs sooner. This authorization and direction is made subject to the provisions of the Railway Labor Act, as amended, and in accordance with existing agreement between the Union and the Company.

Employee Register No. _____
Classification _____
Domicile _____
Date _____
Signature of Employee _____
Street Address _____
City and State _____

(N) When a member of the Union properly executes such check-off form, the Secretary-Treasurer of the Union shall forward the original signed copy to the Manager of Payroll, Kansas City Administrative Center, Kansas City, Missouri 64195. A check-off form must be completed in a

legible manner or it will be returned to the Secretary-Treasurer of the Union for correction. Any notice of revocation as provided for in this Section or the Railway Labor Act, as amended, must be in writing, signed by the employee and two copies delivered by certified mail, addressed to the Secretary-Treasurer of the Union. Dues deductions will be continued until one (1) copy of such notice of revocation is received by the Manager of Payroll, Kansas City Administrative Center, Kansas City, Missouri 64195, from the Secretary-Treasurer of the Independent Federation of Flight Attendants. Check-off forms and notices received by the Manager of Payroll will be stamp-dated on the date received and will constitute notice to the Company on the date received and not when mailed.

(O) When a check-off form, as specified herein, is received by the Manager of Payroll fifteen (15) days or more before the issuing date of the first bi-weekly paycheck of the month, deductions will commence with such paycheck and continue thereafter until revoked or canceled as provided in this Article. The Company will remit to the Union a check in payment of all dues collected as soon after the pay day on which deductions were made, as practicable but no later than the 25th day of the month. The Company remittance of Union membership dues to the office of the Secretary-Treasurer of the Union will be accompanied by two (2) copies of a list for each location which includes (1) names, (2) employee register numbers, (3) location numbers, and (4) individual amounts deducted.

(P) An employee who has executed a check-off form and who has been (1) transferred or promoted to a job not covered by the Agreement, (excluding transfers or promotions on a "Temporary" or "Acting" basis), (2) who quits or resigns from the Company, or is (3) otherwise terminated from the employ of the Company, shall be deemed to have automatically revoked his/her assignment as of the

date of such action and if he/she (1) transfers back or returns to a job covered by the Agreement, (2) is rehired, or (3) re-employed, further deductions of Union dues will be made only upon execution and receipt of another check-off form.

No deductions of Union dues will be made from the wages of any Flight Attendant who has executed a check-off form and who has taken a leave of absence without pay or who has been laid off. Upon return to work as a Flight Attendant, deductions will be automatically resumed, provided the Flight Attendant has not revoked the assignment in accordance with the other appropriate provisions of this Agreement and of the Railway Labor Act, as amended.

(Q) Collection of any back dues owed at the time of starting deductions for an employee, collection of dues missed because the employee's earnings were not sufficient to cover the payment of dues for a particular pay period, and collection of dues missed because of accidental errors in the accounting procedure, will be the responsibility of the Union and will not be the subject of payroll deduction. It will be the Union's responsibility to verify apparent errors with the individual Union member before the representative contacts the Company's Manager of Payroll.

(R) Deductions of membership dues shall be made from one (1) paycheck each month provided there is a balance in the paycheck sufficient to cover the amount after all deductions authorized by the employee or required by law have been justified. In the event of termination of employment, there shall be no obligation of the Company to collect dues until all such other deductions (including money claims of the Company and the Credit Union) have been made, and such obligation to collect dues shall not extend beyond the pay period in which the employee's last day of work occurs.

(S) This Article shall be in force only so long as the Union continues as the recognized representative of the employees under this Agreement.

(T) The Union shall indemnify and save the Company harmless against all forms of liability that shall arise out of or by reason of action taken by the Company which action was requested by the Union under the provisions of this Article.

It is agreed that the Company will promptly notify the Union of all claims of liability made against the Company pursuant to such action taken by the Company, and the Company will make every reasonable effort to defend itself against such liability.

* * *

ARTICLE 27

REOPENERS

(A) Foreign Bases

Should the Company decide to establish foreign bases outside the contiguous forty-eight (48) United States and Washington, D.C., it shall promptly notify the Independent Federation of Flight Attendants. Thereafter conferences may, irrespective of any provisions of Article 28 (Duration) of the Agreement be initiated by either the Company or the Union under the provisions of the Railway Labor Act, as amended, for the purpose of negotiating rates of compensation, rules and working conditions with respect thereto.

(B) New Equipment

In the event that the Company places new equipment into operation other than the equipment in operation on the date of signing, the Company will promptly notify the Union. Thereafter, conferences may, irrespective of any provisions of Article 28 (Duration) of the Agreement, be

initiated by either the Company or the Union under the provisions of the Railway Labor Act, as amended for the purpose of negotiating rates of compensation, rules, and working conditions with respect thereto. This paragraph shall not be applicable to modified versions of equipment in operation on date of signing nor shall this paragraph be applicable to the Boeing 767 or the DC-9-80. Flight Attendants shall fly such new equipment once declared airworthy by the Federal Aviation Administration whether such rates of compensation, rules and working conditions have been agreed upon, provided, however, that this obligation shall not continue if such rates of compensation, rules and working conditions have not been agreed upon within six (6) months after such new equipment has been placed in service by the Company. Flight Attendants shall not fly supersonic aircraft prior to agreement on rates of compensation, rules and working conditions.

(C) Mergers, Purchase, Acquisition, Absorption

In the event the Company purchases, acquires or absorbs another airline or portions thereof, or in the event the Company or a portion thereof is purchased, acquired or absorbed by another airline, or in the event the Company merges with another airline, the Company will promptly notify the Union and conferences may irrespective of any provisions of Article 28 (Duration) of the Agreement, be initiated by either the Company or the Union under the provisions of the Railway Labor Act, as amended for the purpose of negotiating rates of compensation, rules and working conditions with respect thereto.

(D) Deregulation

In the event that the Company, because of the enactment of Federal legislation on the deregulation of the Air Transport Industry undertakes a major restructuring of its existing routes which seriously and adversely affects the Company and/or the employees covered by this Agree-

ment, conferences may, irrespective of any provisions of Article 28 (Duration) of the Agreement, be initiated by either the Company or the Union under the provisions of the Railway Labor Act, as amended for the purpose of negotiating rates of compensation, rules and working conditions for such operation.

(E) Wage Controls, Deferrals, Cut-Backs

Should the Federal Government institute any form of wage controls, review or reporting requirements, the parties to this Agreement shall meet and jointly prepare any and all reports to be filed with the Government. Further, should any portion of this Collective Bargaining Agreement be deferred or cut back by action of the Federal Government, the Union irrespective of any provisions of Article 28 (Duration) of such Agreement, shall have the right to initiate conferences under the provisions of the Railway Labor Act, as amended, for the purpose of negotiating rates of compensation in compliance with Government requirements.

ARTICLE 28

DURATION OF AGREEMENT

This Agreement signed this 12th day of April 1983 shall supersede and take precedence over all agreements, supplemental agreements, amendments, letters of understanding, except those contained herein, and similar documents executed between the Company and the Union prior to signing of this Agreement.

Except as otherwise specified in this Agreement, this entire Agreement shall be effective August 1, 1981 shall remain in effect until July 31, 1984, and thereafter shall renew itself without change for yearly periods unless written notice of intended change is served in accordance with Section 6, Title 1 of the Railway Labor Act, as amended, by either party hereto, at least 90 days prior to the renewal date in each year.

IN WITNESS WHEREOF, the parties have signed this Agreement on April 12, 1983.

For the Company:

TRANS WORLD AIRLINES, INC.

/s/ J.C. Hilly
Vice President, Labor Relations

WITNESS:
/s/ JoAnn Capece
J.W. Hoar
Renée E. Kamm
G.M. Moran
Leo J. Murphy
K.L. Smith

For the Flight Attendants in the Service of Trans World Airlines, Inc. as Represented by the Independent Federation of Flight Attendants:

/s/ Arthur Teolis
President, I.F.F.A.

WITNESS:
/s/ V.L. Frankovich
Mary Ellen Miller
C.W. Numrich
John E. Salvador

LETTER NO. 1

The Air Line Stewards and Stewardesses Association, Local 550, Transport Workers Union of America, AFL-CIO, and Trans World Airlines, Inc., hereby agree:

1. That the Flight Attendants will continue to perform those flight service functions which normally fall within their classification on flights which are solely military in nature and their cargo composed entirely of military commodities or personnel where the carriage of the traffic on such flights is certified by the United States Department of Defense as in accordance with the National interest even though the Flight Attendants withdraw from commercial service because of unresolved labor disputes of any type, including disputes arising out of negotiations for a new contract.

2. That pay and other benefits for Flight Attendants assigned to such military flights pursuant to paragraph 1 hereof, will

   (a) for any period prior to the opening date of the contract between the parties be governed by the then existing contract unless modified by agreement of the parties, and

   (b) after the opening date of the contract be governed by either the contract that existed at or prior to the said labor dispute or the contract negotiated as a settlement of such dispute, whichever is more beneficial to the Flight Attendants.

3. That this is consistent with the long-standing policy and performance of the Flight Attendants and of the Air Line Stewards and Stewardesses Association, Local 550, Transport Workers Union of America, AFL-CIO.

4. In the event any employee is assigned to any military flight, pursuant to the terms of paragraph 1 hereof, the Air Line Stewards and Stewardesses Association, Local 550, Transport Workers Union of America, AFL-CIO, will be given a certification by the Vice President of Industrial Relations or his designee that such flight will be exclusively for military purposes.

5. That, to the extent necessary to effectuate its purpose, this understanding constitutes an amendment and modification of the collective bargaining agreement between the parties hereto and, notwithstanding any other provision of the said collective bargaining agreement, this agreement shall continue indefinitely but may be revoked by either of the parties hereto upon two (2) years prior notice. However, if after the certification provided in paragraphs 1 and 4 the Company should willfully combine military with non-military traffic during the period of any strike, the Union will terminate this supplemental agreement forthwith. Proof of such violation shall be established through the adjustment procedures established by the collective bargaining agreement, but such procedure shall be accelerated to provide for a hearing and final decision within twenty-four (24) hours after the grievance is submitted. Should it be impossible to achieve a final decision within such twenty-four (24) hour period, such period shall be extended to the extent necessary.

Signed this 22nd day of October, 1970.

For TRANS WORLD AIRLINES, INC.

/s/ D.J. Crombie
Vice President - Industrial Relations

For THE AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO

/s/ James F. Horst
International Executive Vice President

APPENDIX F

Complaint for Declaratory Judgment, filed April 25, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

Civil Action No. 86-6059-CV-SJ-6

TRANS WORLD AIRLINES, INC.
Kansas City International Airport Kansas City, Missouri,
Plaintiff,

—VS.—

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
an Unincorporated Labor Organization
630 Third Avenue
New York, New York 10017,
Defendants.

COMPLAINT FOR DECLARATORY JUDGMENT

Comes now Plaintiff, Trans World Airlines, Inc. ("TWA") and for its complaint against Defendant, the Independent Federation of Flight Attendants ("IFFA"), states the following:

Jurisdiction And Venue

1. This action arises under and this Court's jurisdiction is invoked pursuant to the Railway Labor Act, as amended (the "RLA" or the "Act"), 45 U.S.C. § 151, *et seq.*, and 28 U.S.C. §§ 1331 and 1337.

2. This Court has jurisdiction under 28 U.S.C. § 2201 to grant the declaratory relief requested.

3. Venue properly lies in this judicial district pursuant to 28 U.S.C. § 1391.

The Parties

4. Plaintiff TWA is a corporation duly organized and existing under the laws of the State of Delaware and is engaged in the common carriage by air in interstate and foreign commerce of persons, property and mail. TWA maintains offices, an overhaul base and a training center in this judicial district, and operates flights to and from the Kansas City International Airport.

5. Plaintiff TWA is a "common carrier by air," within the meaning of Title II of the Railway Labor Act, and accordingly a "carrier" within the meaning of Title I of that Act, and is subject to the provisions of the Act.

6. Defendant IFFA is a voluntary, unincorporated labor organization with its principal office and headquarters located at 630 Third Avenue, New York, New York. IFFA is the designated and authorized bargaining representative under the RLA of TWA employees in the flight attendant craft or class, including flight attendants in this judicial district.

7. Defendant IFFA is a "representative" within the meaning of the RLA, and is subject to the provisions of the Act.

RLA Provisions for Maintaining and Changing Agreements as to Rates of Pay, Rules and Working Conditions

8. RLA Section 2 First, 45 U.S.C. § 152 First, imposes on carriers by air, their employees and the representatives of those employees a duty to

> "exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

9. RLA Section 2 Seventh, 45 U.S.C. § 152 Seventh, makes it unlawful for a carrier, its officers, or agents to change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements, except in the manner prescribed in such agreements or as provided by the RLA.

10. RLA Section 6 provides that

> "Carriers and representatives of the [sic] employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

11. RLA Section 5 First, 45 U.S.C. § 155 First, provides that when the services of the NMB have been requested by either party the Board

> shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

> If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title [RLA Section 10], no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

12. The duty to maintain the status quo until exhaustion of the statutory procedures established by RLA Sections 5 First, 6 and 10, 45 U.S.C. §§ 155 First, 156 and 160, applies to carrier employees and their representatives, as well as to carriers.

RLA Provisions Permitting Union Shop Only Pursuant to Agreements

13. RLA Section 2 Fourth provides that it shall be unlawful for a carrier, its officers or agents

> "to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions:"

14. RLA Section 2 Eleventh provides that notwithstanding any other provision of the Act, a carrier and the labor organization designated and authorized to represent the carrier's employees under the Act, shall be permitted

> "to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class *Provided*, That no such agree-

ment shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership."

TWA/IFFA Agreement Signed April 12, 1983

15. On April 12, 1983, TWA and IFFA signed an agreement, establishing the rates of pay, rules and working conditions of the flight attendants in the service of TWA (hereafter the 1983 Agreement). Under Article 2 of that Agreement, TWA flight attendants were classified as Cabin Attendants, Flight Pursers and Service Managers.

16. Article 28 of the 1983 Agreement, provided that

"this entire Agreement shall be effective August 1, 1981, shall remain in effect until July 31, 1984, and thereafter shall renew itself without change for yearly periods unless written notice of intended change is served in accordance with Section 6, Title 1 of the Railway Labor Act, as amended, by either party hereto, at least 90 days prior to the renewal date in each year."

17. As permitted by RLA Section 2 Eleventh, quoted in paragraph 14 above, Article 24 (A-L) of the 1983 Agreement contained provisions as to "Union Security", which provided in relevant part, as follows:

"(A) Each employee now or hereafter employed in any classification covered by this Agreement shall, as a condition of continued employment in such work within sixty (60) days following the date such employee enters training become a member of, and thereafter maintain membership in good standing (as herein defined), in the Union, except as provided otherwise herein. Such conditions shall

not apply with respect to any employee to whom such membership is not available upon the same terms and conditions as are generally applicable to any other member of his classification, or with respect to any employee to whom membership is denied or terminated for any reason other than the failure of the employee to tender the dues uniformly required of other members of his/her classification as a condition of acquiring or retaining membership.

• • •

"For the purpose of this Article, 'membership in good standing in the Union' shall consist of the payments by the employee, not later than the last day of the following calendar month, of dues for each calendar month and initiation fees (not including fines and penalties), which are uniformly required of members of his/her classification as a condition of acquiring or retaining membership. The employee may have his monthly membership dues deducted from his earnings as provided in paragraph (M) of this Article, or he/she may pay his/her membership dues directly to the Union."

18. Article 24(E) provided that an employee in a flight attendant classification who failed to make dues payments pursuant to the contractual schedule could be notified by the Union that failure to correct the delinquency within 15 days would subject him/her to discharge under the terms of the agreement (Article 24(E)(1); required the Company, within 24 hours of certification by the Union of continued delinquency, to notify such employee that he/she would be subject to discharge unless the delinquency was corrected before expiration of another 15-day period (Article 24(E)(2) and (3); provided that failure to make or verify that the payment had been made within the 15-day period referred to in Article 24(E)(3) would result in the employee's discharge (Article 24(E)(3)); provided for a protest by an employee discharged or about to be discharged for delinquency and for determination of any protest by the System Board of Adjustment established by

Article 17 of the Agreement, and provided that a protesting employee could not be discharged until the day following a decision by the System Board of Adjustment that the employee should be discharged.

19. Article 24(L) provided that

> "When new employees are hired or transferred into classifications covered by this Agreement the Company will furnish monthly to the Union the names, classification, point of employment and payroll register number of such new employees."

Notices of Intended Changes in the 1983 Agreement

20. By letter dated February 29, 1984, and pursuant to RLA Section 6, 45 U.S.C. § 156, and Article 28 of the 1983 Agreement, TWA served on IFFA a notice of intended changes in that Agreement, and its proposals for the new agreement.

21. Conferences for the purpose of making a new agreement began on March 29, 1984.

22. By letter dated April 27, 1984, and pursuant to Section 6 of the RLA and Article 28 of the 1983 Agreement, IFFA served on TWA notice of intended changes in that Agreement, and its proposals for the new agreement.

23. Neither party proposed that the new agreement makes provisions for any difference in the Union security provisions of Article 24 (A-L).

24. After March 29, 1984, TWA and IFFA representatives met in conference from time to time to discuss proposed changes in the old agreement and TWA exerted every reasonably effort to reach a new agreement.

25. The parties did not reach agreement, and on or about May 13, 1984, TWA invoked the services of the NMB pursuant to RLA Section 5 First, to assist the parties, through mediation, in reaching agreement. The NMB docketed the dispute and, on or about July 12, 1984, appointed a mediator to assist the parties in their negotiations.

Expiration of the Agreement and Maintenance of Status Quo Conditions

26. Notices of intended changes having been filed by TWA on February 29, 1984 and by IFFA on April 27, 1984, the "entire agreement" signed in April 1983 did not renew itself and expired on July 31, 1984, as provided by Article 28 of the Agreement.

27. TWA and IFFA were thereafter required by RLA Sections 5 First and 6, to continue in effect until exhaustion of the statutory procedures for resolution of the dispute over a proposed new agreement, the conditions actually in effect on the date the old Agreement expired.

28. Conferences with mediation were held from time to time after expiration of the 1983 Agreement. No agreement was reached as to the terms of a new agreement by February 4, 1986.

29. On February 4, 1986, in accordance with RLA Section 5 First, the NMB notified TWA and IFFA that the 30-day "cooling off" period mandated by RLA Section 5 First had begun.

30. Pursuant to that notification, if no agreement was reached by midnight, March 6, 1986, both parties would be free to resort to self-help. IFFA would be free to strike to seek to achieve its demands and TWA would be free to make changes in the conditions existing at the time the agreement expired and continued during the status quo period, as required by RLA Sections 5 First and 6.

31. On March 5, 1986, IFFA commenced an action in the United States District Court for the Western District of Missouri, Civil Action No. 86-6030, alleging that TWA had violated the RLA by failing to exert every reasonable effort to reach agreement, and that the procedures mandated by RLA Sections 5 and 6 had not been exhausted, and seeking a temporary restraining order to enjoin TWA from changing the conditions then in effect if no agreement had been reached by

midnight, March 6, 1986. The temporary restraining order was denied on March 5, 1986.

32. No new agreement had been reached by the parties by midnight, March 6, 1986.

Midnight, March 6, 1986—Status Quo Obligations End

33. At midnight, March 6, 1986, E.S.T., TWA's and IFFA's obligations under RLA Sections 5 and 6 to maintain the status quo ended. At that time, TWA and IFFA representatives were discussing a proposal made by IFFA about ten minutes before midnight.

34. Picketing by flight attendants began precisely at midnight, while the parties were discussing IFFA's last offer.

35. At about 0:15 A.M., E.S.T. on March 7, 1986, as the parties were resuming discussions on IFFA's last offer, IFFA officially announced a strike, and flight attendants began to refuse to perform assigned duties.

36. At about 1:00 A.M. on March 7, 1986, after IFFA had broken off negotiations, TWA announced changes in flight attendant rates of pay, rules and working conditions, and began hiring replacements for striking flight attendants.

IFFA Request for Names, Addresses and Identifying Information as to TWA Employees Performing Flight Attendant Duties

37. By letter dated March 17, 1986 from IFFA's President, Vicki Frankovich, IFFA requested TWA to provide information as to its post-strike operations, purportedly to enable IFFA to continue negotiations for a new agreement and otherwise to act as the representative of TWA's flight attendants. The information requested included the names, current addresses, home telephone numbers and other identifying data as to all TWA employees who had performed flight attendant duties on and after March 7, 1986, including supervisory employees not represented by IFFA and employees in crafts or classes not represented by IFFA who had been temporarily assigned to perform flight attendant duties.

38. By letter dated April 1, 1986, from TWA Vice President Labor Relations, J. W. Hoar, to Frankovich, TWA furnished IFFA with some of the requested information. In light of reported and documented incidents of harassment of TWA personnel performing flight attendant duties during the strike, including direct and telephoned threats of bodily harm, TWA declined to make available the names, addresses or telephone numbers of any employee as requested by IFFA.

39. TWA's April 1 letter stated that while TWA was unwilling, in light of the evidence of ongoing harassment of individual TWA employees, to provide IFFA, as requested, with the names or addresses of any newly-hired flight attendants, TWA would, if requested by IFFA, put a notice on flight attendant bulletin boards informing such employees of IFFA's desire to communicate with them, and of the appropriate means to respond to IFFA, if they wished to do so.

40. By letter dated April 1, 1986, from William Hoffman, IFFA's Secretary-Treasurer, to "All Flight Attendants," IFFA requested all flight attendants to remit their union dues for the month of April in order to support IFFA's strike objectives. On information and belief, that letter was received, at their homes, by currently working flight attendants employed prior to March 7, 1986.

41. On April 1, 1986, TWA paid over to IFFA the full amount of union dues withheld from flight attendant paychecks on March 3, 1986, pursuant to the union security and dues checkoff provisions of Article 24 in effect prior to March 7, 1986, and IFFA, by separate check, paid over to TWA, amounts owing to TWA as a result of the time taken off during the month of February, by working flight attendants, for union business.

IFFA Demands Information to Enforce Union Security Provisions

42. On April 11, 1986, by a letter from Hoffman to Hoar, IFFA demanded that TWA provide it with the names, current addresses and other identifying data as to all TWA employees

"currently working as flight attendants," purportedly as required by the expired April 1983 Agreement and to enable IFFA to follow the procedures established in Article 24(E) through (L) for enforcing the provisions of Article 24(A). The letter appeared to reject TWA's offer to provide IFFA with a means for communicating with working flight attendants who wished to make themselves available to IFFA, and stated that unless the information was furnished by April 18, 1986, IFFA would take "legal action to obtain the information." A true copy of IFFA's April 11 letter is attached hereto as Exhibit A.

43. By letter dated April 18, 1986, from Hoar to Hoffman, TWA replied that IFFA had no urgent need for the information demanded by the arbitrary April 18 deadline; that no working flight attendant would be subject to discharge by that date, even if Article 24 were still in effect, and that TWA would respond more fully by the following week. A true copy of that letter is attached hereto as Exhibit B.

44. IFFA responded by a letter from Hoffman to Hoar, dated April 23, 1986, repeating its April 11, 1986 demand for names and addresses, and disputing TWA's stated interpretation of Article 24(A-L), if still in effect. A true copy of that letter is attached hereto as Exhibit C.

45. By letter dated April 25, 1986, from Hoar to Hoffman, TWA stated its position (a) that Article 24, as contained in the 1983 Agreement, had expired by the terms of that Agreement on July 31, 1984; (b) that TWA's obligation to maintain the status quo conditions, including maintenance of union membership as a condition of continued employment in a flight attendant classification had expired at midnight, March 6, 1986; and (c) that after midnight, March 6, 1986, TWA had no obligation under the status quo provisions of the RLA to provide information to assist IFFA in inducing any flight attendant to become a member of the union or in monitoring payment of dues by flight attendants, or to discharge any flight attendant who did not maintain membership in good standing in the union, and (d) that in the absence of an agreement and after expiration of the status quo period, TWA would violate

RLA Sections 2, Fourth and Eleventh by doing so at IFFA's request or demand. A true copy of that letter, which was delivered by hand to IFFA's offices at 630 Third Avenue, New York on April 25, 1986, is attached hereto as Exhibit D.

Disputes as to the Continuation of the Parties' Obligations Under the Agreement and the RLA

46. TWA maintains that it has no continuing obligation under the Union Security provisions of the expired agreement, or the status quo provisions of the RLA, and cannot, without violating the Railway Labor Act, continue to give effect to those provisions at the union's demand.

47. IFFA appears to maintain that the Union Security provisions of Article 24(A-L) are currently in effect, and binding on TWA.

48. By its April 23, 1983 letter, IFFA asserts that TWA has an immediate obligation under Article 24(L) of the 1983 Agreement, to furnish IFFA with the names, current home addresses and other identifying information as to working flight attendants. TWA denies that Article 24(L) has any current force or effect.

49. TWA has refused to furnish the requested information to IFFA on the ground that it has no continuing obligation under or as a result of Article 24, and on the additional ground that working flight attendants have been subject to harassment and intimidation by striking flight attendants, including threatening and obscene phone calls, and physical assaults, and that furnishing that information to IFFA would increase the exposure of such TWA employees.

50. The parties' dispute as to whether TWA has any continuing obligation to give continued effect to the Union Security provisions of the expired agreement, and whether TWA could legally do so at IFFA's request or demand, is an actual case and controversy affecting legal relations between the parties, and raises issues as to rights and obligations under the Railway Labor Act which this Court has jurisdiction to decide.

51. Unless the dispute as to the continued effect of Article 24 is resolved, IFFA will continue to demand that TWA furnish it with information to enforce the requirements of Article 24 and, on information and belief, will incorrectly inform working flight attendants that they are required as a condition of employment to become members of IFFA and pay union dues as a condition of continued employment, and will demand that TWA discharge flight attendants who fail or refuse to pay dues to the union in accordance with the provisions of the expired Agreement.

REMEDY

WHEREFORE, plaintiff respectfully requests that this Court

1. Consolidate this action with *Independent Federation of Flight Attendants v. Trans World Airlines, Inc.*, Civil Action No. 86-6030-CV-SJ-6, now pending before this Court, in which IFFA, while on strike against TWA, alleges that the status quo period has not been exhausted;

2. Issue a declaratory judgment stating that unless and until this Court should grant the relief requested by IFFA in that action, requiring a return to the status quo conditions in effect on or before March 6, 1986, TWA has no continuing obligation to treat the union security or related provisions of the expired 1983 Agreement as having current effect, under the terms of the expired Agreement or by operation of the Railway Labor Act;

3. Granting such other, different, and further relief as the Court may deem just and proper.

Respectfully submitted,

PROSKAUER ROSE GOETZ & MENDELSOHN
Murray Gartner
300 Park Avenue
New York, New York 10022
(212) 909-7000

STINSON, MAG & FIZZELL

By /s/ PAUL E. DONNELLY
Paul E. Donnelly
920 Main Street
Suite 2100
Kansas City, Missouri 64105
(816) 842-8600

Attorneys for Plaintiff
Trans World Airlines, Inc.

Dated: April 25, 1986

EXHIBIT "A"

(Letterhead of INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS, New York)

HAND DELIVERED

April 11, 1986

Mr. J. W. Hoar
Vice President
Labor Relations
Trans World Airlines, Inc.
605 Third Avenue
New York, NY 10158

Dear Mr. Hoar:

As you know, under Article 24(A) of the Agreement, each employee employed in any flight attendant classification must, as a condition of continued employment in such work, within sixty days following the date such employee enters training become a member of, and thereafter maintain membership in good standing (as defined in said Article), in the Union.

Article 24(E) through (L) provides a procedure for enforcing this obligation in the event an employee fails to pay the dues and initiation fees necessary to acquire and maintain membership in good standing. To commence this procedure, as Secretary-Treasurer of the Union, I am required to notify each delinquent employee by certified letter that the employee is delinquent in the payment of dues and, accordingly, is subject to discharge. Under Article 24(L) when new employees are hired or transferred into flight attendant classifications the Company is required to furnish monthly to the Union the names, classifications, points of employment and payroll register numbers of such new employees. In addition, under Article 20(I)(2), the Company is required upon request to furnish the Union the current addresses of flight attendant employees.

IFFA has reason to believe that there are employees currently working as flight attendants who have not fulfilled their obligations under Article 24 and who may be subject to discharge. In order to determine whether any employees currently or hereafter employed as flight attendants are now, or may in the future, be delinquent in the payment of dues and initiation fees under Article 24, and if so, to enforce the provisions of Article 24, it is necessary that TWA provide IFFA with the following information with respect to all employees who have been working in flight attendant classifications since March 7, 1986, (or who hereafter are so employed), and continue to provide such information on an ongoing basis:

1. Each such employee's full name;
2. Each such employee's correct current mailing address;
3. Each such employee's classification;
4. Each such employee's point of employment;
5. Each such employee's payroll register number;
6. The date each such employee entered training;
7. The date each such employee was hired or transferred into a flight attendant classification.

While IFFA's need for, and TWA's obligation to provide, the requested information under Article 24 is clear, IFFA also believes that as the certified representative of TWA's employees in the flight attendant craft or class it is entitled under the Railway Labor Act, irrespective of Article 24, to the information requested. Indeed, certain of the above information has already been requested in a letter to you from Vicki Frankovich, dated March 17, 1986.

In your April 1, 1986, reply to Ms. Frankovich's request, you declined to make available to IFFA the names or addresses of the more than 1,800 individuals you claim have been hired to fill flight attendant positions since March 7, 1986. The only justification you offer for refusing to provide such information is unspecified allegations of "reported and documented incidents of harrassment of TWA personnel now working as flight attendants, including direct and telephoned threats of bodily

harm." As an alternative to providing the information requested by Ms. Frankovich's letter, you offer to put a notice on flight attendant bulletin boards informing employees of IFFA's desire to communicate with them, and of the appropriate means to respond to IFFA if they wish to do so.

Please be advised that your alternative means of communicating with the current flight attendant employees will not suffice to enable IFFA to monitor compliance with and to enforce Article 24. Without in any way waiving IFFA's position that it is entitled to *all* of the information previously requested in Ms. Frankovich's letter of March 17, 1986, I ask that you reconsider your position with respect to the information requested in this letter in light of the Article 24 considerations. In response to your allegations of "harrassment", and without in any way acknowledging the validity of any such unspecified allegations, IFFA is willing to assure TWA that if the information requested in this letter is provided, it will be maintained only at IFFA Headquarters at 630 Third Avenue, New York, New York, will not be distributed to persons other than IFFA's officers and headquarters staff, and will be used for no purposes other than legitimate union purposes, including monitoring compliance with and enforcing Article 24.

If you have any questions concerning this request, please feel free to contact me. If satisfactory arrangements for supplying the requested information are not made within one week from the date of this letter, IFFA will request our attorneys to institute immediate legal action to obtain the information.

Very truly yours,

/s/ W. M. HOFFMAN
William Hoffman
Secretary-Treasurer

cc: V. Frankovich

BH3SJ1

EXHIBIT "D"

(Letterhead of TWA)

HAND DELIVERY

April 25, 1986

Mr. William Hoffman
Secretary-Treasurer
Independent Federation of
Flight Attendants
630 Third Avenue
New York, NY 10017

Dear Mr. Hoffman:

This is in further response to your letter of April 11, 1986, demanding that TWA provide you with names, current addresses and other identifying information as to all flight attendants who have worked since March 7, 1986, purportedly for the principal purpose of enforcement by IFFA of Article 24 of the TWA/IFFA agreement, signed April 12, 1983. We are advised by counsel, and we believe, that after midnight, March 6, 1986, TWA had no continuing obligation to treat maintenance of union membership as a condition of continued employment, or to provide IFFA with specific information to monitor the payment of dues by working flight attendants.

Article 28 of the TWA/IFFA Agreement provided that:

> ". . . this entire Agreement shall be effective August 1, 1981, shall remain in effect until July 31, 1984, and thereafter shall renew itself without change for yearly periods unless written notice of intended change is served in accordance with Section 6, Title I of the Railway Labor Act, as amended, by either party hereto, at least 90 days prior to the renewal date in each year."

Section 6 notices were served by TWA on February 29, 1984, and by IFFA on April 27, 1984. As a result, the "entire agreement" did not renew itself, and expired by its terms on July 31, 1984.

Thereafter, TWA and IFFA were required by Sections 5 and 6 of the Railway Labor Act to maintain the working conditions and practices in effect prior to contract expiration, including the maintenance of membership and dues checkoff procedures contained in Article 24. TWA's and IFFA's status quo obligations, however, ended at midnight, March 6, at which time picketing by IFFA began, followed shortly thereafter by a formal stike announcement, and the failure to report to work by most of TWA's flight attendants represented by IFFA.

We do not believe that after the expiration of the agreement by its terms and the exhaustion of the ensuing lengthy statutory negotiation procedures, TWA has any remaining statutory or contractual obligation to comply with or enforce the "union security" provisions of the expired agreement. It is contrary to all reason to suggest that an expired agreement requires flight attendants, as a condition of their continued employment by TWA, to pay dues to support IFFA's strike, although they have chosen to work. IFFA's position, in other words, appears to be that a flight attendant who is now working, in order to keep working, must pay dues to the union which is trying to persuade that flight attendant to stop working.

We have been advised by counsel, relying on the decisions of the Court of Appeals for the Second Circuit in *Flight Engineers v. Eastern Air Lines, Inc.*, 385 F.2d 581 (2d Cir. 1966) and the Court of Appeals for the Ninth Circuit in *International Association of Machinists and Aerospace Workers v. Reeve Aleutian Airways, Inc.*, 469 F.2d 990 (9th Cir. 1972), *cert. denied*, 411 U.S. 982 (1973), that an agreement, which has expired by its terms on a specified date because of the service of Section 6 notices, has no continuing contractual effect after its expiration; that insofar as the contract provisions form a part of the status quo required to be maintained by Sections 5 and 6 of the Railway Labor Act, those conditions of employment along with all other components of the status quo are no longer obligations of the carrier once the status quo period has expired; that in *Reeve Aleutian*, involving a contract with a duration clause identical to Article 28 of the April 1983 TWA/IFFA agreement, the Court of Appeals expressly held that the union security contract provision, which had not been the

subject of a Section 6 notice, was not enforceable against the carrier once the parties were free to resort to self-help; and that, more recently, in *International Association v. Qantas Airways, Ltd.*, Case No. 85-7150 JVP (D.C., Cal. 1985), a California district court held that the carrier not only had no obligation, after the end of the status quo period, to enforce the maintenance of membership provisions of the expired agreement, but that the carrier would violate Section 2, Fourth and Eleventh of the Railway Labor Act if it did so on the union's demand.

While we disagree with your interpretations of Article 24 of the expired agreement, as stated in your letter of April 23, 1986—particularly insofar as you maintain that the training entry date fixes the start of the 60-day period specified in Article 24 even though the trainee was not an employee on that date—we see no need to debate the meaning of an expired provision. We have previously told you, moreover, that we will not furnish you with the names, home addresses or other identifying information with respect to any TWA employees currently performing flight attendant duties, because of the continuing harassment of those employees, including threats and assaults by striking flight attendants on and off the picket line. We did offer you a reasonable means for communicating with the flight attendants who wish to make themselves available to IFFA, which you appear to have rejected in your April 11th letter.

Since the legal issue as to the continuing effect of the union security provision of the expired agreement is clearly drawn between the parties, and trial of IFFA's pending suit against TWA has been postponed at IFFA's request, TWA intends to file in Kansas City today an action seeking a declaratory judgment as to the parties' rights and obligations with respect to union security.

Yours very truly,

/s/ J. W. HOAR

J. W. Hoar
Vice President
Labor Relations

Defendant's Answer to Complaint for Declaratory Judgment and Counterclaim, filed June 3, 1986

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

Civil Action No. 86-6059-CV-SJ-6

TRANS WORLD AIRLINES,

Plaintiff,

—vs.—

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Defendant.

DEFENDANT'S ANSWER TO COMPLAINT FOR DECLARATORY JUDGMENT AND COUNTERCLAIM

Comes now the Defendant, the Independent Federation of Flight Attendants ("IFFA") and today states the following in response to the Complaint of Plaintiff Trans World Airlines ("TWA").

1. Defendant admits the allegations contained in paragraph 1 of the Complaint.

2. Defendant admits the allegations contained in paragraph 2 of the Complaint.

3. Defendant admits the allegations contained in paragraph 3 of the Complaint.

4. Defendant admits the allegations contained in paragraph 4 of the Complaint.

5. Defendant admits the allegations contained in paragraph 5 of the Complaint.

6. Defendant admits the allegations contained in paragraph 6 of the Complaint.

7. Defendant admits the allegations contained in paragraph 7 of the Complaint.

8. Defendant admits the allegations contained in paragraph 8 of the Complaint.

9. Defendant admits the allegations contained in paragraph 9 of the Complaint.

10. Defendant admits the allegations contained in paragraph 10 of the Complaint.

11. Defendant admits the allegations contained in paragraph 11 of the Complaint.

12. In response to paragraph 12, Defendant admits that carrier employees and representatives cannot engage in a work stoppage until the procedures of the RLA have been exhausted, but otherwise denies the allegations of paragraph 12 of the Complaint.

13. Defendant admits the allegations contained in paragraph 13 of the Complaint.

14. Defendant admits the allegations contained in paragraph 14 of the Complaint.

15. Defendant admits the allegations contained in paragraph 15 of the Complaint.

16. Defendant admits the allegations contained in paragraph 16 of the Complaint.

17. Defendant admits the allegations contained in paragraph 17 of the Complaint.

18. Defendant admits the allegations contained in paragraph 18 of the Complaint.

19. Defendant admits the allegations contained in paragraph 19 of the Complaint.

20. Defendant admits the allegations contained in paragraph 20 of the Complaint.

21. Defendant admits the allegations contained in paragraph 21 of the Complaint.

22. Defendant admits the allegations contained in paragraph 22 of the Complaint.

23. Defendant admits the allegations contained in paragraph 23 of the Complaint.

24. In response to paragraph 24 of the Complaint, Defendant denies that "TWA exerted every reasonably (sic) effort to reach a new agreement", but otherwise admits the allegations contained therein.

25. Defendant admits the allegations contained in paragraph 25 of the Complaint.

26. Defendant denies the allegations contained in paragraph 26 of the Complaint.

27. In response to paragraph 27 of the Complaint, Defendant denies that the "old Agreement expired", but otherwise admits the allegations contained therein.

28. In response to paragraph 28, Defendant states that conferences were held both with and without mediation, and otherwise admits the allegations contained therein.

29. Defendant admits the allegations contained in paragraph 29 of the Complaint.

30. In response to paragraph 30, Defendant admits that as of March 6, 1986 the parties would be free to resort to self-help, that IFFA would be free to strike, and that TWA would be free to implement certain changes in working conditions (but not others). Defendant otherwise denies the allegations contained therein.

31. Defendant admits the allegations contained in paragraph 31 of the Complaint.

32. Defendant admits the allegations contained in paragraph 32 of the Complaint.

33. In response to paragraph 33, Defendant admits that IFFA made a counter-proposal to TWA shortly before 12:01 A.M., E.S.T., March 7, 1986, but otherwise denies the allegations contained therein.

34. Defendant denies the allegations contained in paragraph 34 of the Complaint.

35. In response to paragraph 35 of the Complaint, Defendant admits only that at some point during the morning of March 7, 1986, flight attendants began a work stoppage, and otherwise denies the allegations contained therein.

36. In response to paragraph 36 of the Complaint, IFFA admits that TWA announced changes in flight attendant rates of pay, rules, and working conditions at about 1:00 A.M. on March 7, 1986, but otherwise denies the allegations contained therein.

37. Except for the word "purportedly", Defendant admits the allegations contained in paragraph 37 of the Complaint.

38. In response to paragraph 38 of the Complaint, Defendant admits that Hoar sent a letter dated April 1, 1986, to Frankovich, and that Hoar refused to provide the information requested by IFFA, but otherwise denies the allgations contained therein.

39. In response to paragraph 39 of the Complaint, Defendant denies Plaintiff's characterizations of the April 1 letter and states that the document speaks for itself.

40. In response to paragraph 40 of the Complaint, Defendant admits that Hoffman sent a letter to flight attendants dated April 1, 1986, but otherwise denies Plaintiff's characterizations of that letter and states that the document speaks for itself.

41. In response to paragraph 41 of the Complaint, Defendant states that Plaintiff has properly stated the spirit and intent of a "settlement agreement" between IFFA and TWA resolving the matters raised by a Motion for Temporary Restraining

Order filed by IFFA on March 27, 1986 in Case No. 86-6030-CV-SJ-6 in this court, and that Defendant is currently checking to ascertain that the amount paid by TWA was the proper amount. Otherwise Defendant denies the allegations of paragraph 41 of the Complaint.

42. In response to paragraph 42 of the Complaint, Defendant admits that Hoffman sent a letter to Hoar dated April 11, 1986, but denies Plaintiff's characterizations of that letter, and states that the document speaks for itself.

43. Defendant admits the allegations contained in paragraph 43 of the Complaint.

44. Defendant admits the allegations ccntained in paragraph 44 of the Complaint.

45. In response to paragraph 45 of the Complaint, Defendant admits that Hoar sent a letter to Hoffman dated April 25, 1986 which purports to state TWA's position, but otherwise Defendant denies the characterizations of that letter and states that the document speaks for itself.

46. In response to paragraph 46 of the Complaint, Defendant admits only that paragraph 46 purports to state TWA's position.

47. In response to paragraph 47 of the Complaint, Defendant states that TWA is obligated to enforce the union security provisions of the contract, Article 24(A-L).

48. Defendant admits the allegations contained in paragraph 48 of the Complaint, except that the letter in question is dated April 23, 1986.

49. In response to paragraph 49 of the Complaint, Defendant admits only that the paragraph purports to state TWA's position.

50. Defendant admits that this case give. .ise to an actual case or controversy but otherwise denies the allegations contained in paragraph 50 of the Complaint.

51. Defendant denies the allegations contained in paragraph 51 of the Complaint.

52. Although TWA was legally free to alter some working conditions as of March 7, 1986, TWA was not legally able to change working conditions which had not been subject to the negotiation procedures under the RLA, including but not limited to the provisions of Article 24(A-L).

WHEREFORE, Defendant prays that the Court enter judgment for Defendant, dismissing Plaintiff's Complaint and declaring that Plaintiff is legally obligated to comply with the union security provisions of the contract as embodied in Article 24(A-L) of the collective bargaining agreement.

COUNTERCLAIM

53. During negotiations, TWA proposed that:

> . . . in the event of a job action, work stoppage or strike by Flight Attendants, the dues check-off procedure shall not be administered by the Company.

54. A strike began on March 7, 1986, and TWA indeed ceased to administer the dues check-off procedure.

55. The strike ended on May 17, 1986, when IFFA made an unconditional offer to return to work.

56. TWA is legally obligated to maintain the status quo in rules, rates of pay, and working conditions, except for matters which have been the subject of proposals and negotiation pursuant to Section 6 of the RLA.

57. TWA is, accordingly, now legally obligated to resume administration of the dues check-off procedure, retroactive to May 17, 1986.

WHEREFORE, Defendant prays that judgment be entered in favor of Defendant on its Counterclaim, and that the Court declare that TWA is required to resume administration of the dues check-off procedure retroactive to May 17, 1986.

JOLLEY, WALSH, HAGER & GORDON
1124 Grand Avenue, Suite 1300
Kansas City, Missouri 64106
(816) 474-1240

By: /s/ DOYLE R. PRYOR
Doyle R. Pryor

By: /s/ STEVEN A. FEHR
Steven A. Fehr

By: /s/ SCOTT A. RAISHER
Scott A. Raisher

Attorneys for Defendant

Plaintiff's Answer to Counterclaim for Declaratory Judgment, filed June 24, 1986

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

Civil Action No. 86-6059-CV-SJ-6

TRANS WORLD AIRLINES, INC.,
Plaintiff,

—v.—

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Defendant.

PLAINTIFF'S ANSWER TO COUNTERCLAIM
FOR DECLARATORY JUDGMENT

Comes now the plaintiff, Trans World Airlines, Inc. ("TWA"), and states the following in response to the counterclaim of the defendant, the Independent Federation of Flight Attendants ("IFFA").

1. Admits the allegations of paragraph 53 of the counterclaim.

2. Admits the allegations of paragraph 54, but denies that the strike was the sole basis on which TWA ceased to administer the dues check-off procedures.

3. Denies the allegations of paragraph 55.

4. States that paragraph 56 states a conclusion of law requiring no response, but nevertheless denies the allegations of paragraph 56.

5. States that paragraph 57 states a conclusion of law requiring no response, but nevertheless denies the allegations of paragraph 57.

WHEREFORE, plaintiff prays that judgment be entered in its favor dismissing defendant's counterclaim.

Dated: June 24, 1986

PROSKAUER ROSE GOETZ & MENDELSOHN

By /s/ MURRAY GARTNER
Murray Gartner
300 Park Avenue
New York, New York 10022
(212) 909-7000

STINSON, MAG & FIZZELL

By /s/ PAUL E. DONNELLY
Paul E. Donnelly
920 Main Street, Suite 2100
Kansas City, Missouri 64105
(816) 842-8600

Attorneys for Plaintiff
Trans World Airlines, Inc.

APPENDIX G

Excerpts from Stipulations in Civil Action No. 86-6084-CV-SJ-6, filed July 21, 1986

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

Civil Action No. 86-6084-CV-SJ-6

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Plaintiff,

—vs.—

TRANS WORLD AIRLINES, INC.,
Defendant.

STIPULATIONS

The parties stipulate that the following facts are not in dispute. They do not stipulate that this is an all-inclusive statement of material facts and each party expressly reserves the right to submit affidavits and/or other evidence as to additional material facts.

1. Exhibit 1 attached is a true and correct copy of the Agreement signed April 12, 1983 between TWA and its flight attendants as represented by IFFA.

2. Exhibit 2 attached is a true and correct copy of TWA's February 29, 1984 notice to IFFA.

3. Exhibit 3 attached is a true and correct copy of the affidavit (with supporting exhibits) of R. Stan Henderson, TWA's Director of In-Flight Services Training, filed by TWA in

Civil Action No. 85-1192-CV-W-O in the Western Division of this Court.

4. The pre-employment flight attendant training program at TWTC, as described in the Henderson affidavit and supporting exhibits (Exhibit 3), continued substantially unchanged from October 1985 until March 7, 1986. During this period, trainees received some, but not all of the service and customer awareness training received by students trained earlier in 1985, resulting in a reduction in total training days from 25 to 17 days.

5. Exhibit 4 attached is a true and correct copy of IFFA's April 27, 1984 notice to TWA.

6. After March 29, 1984, IFFA and TWA representatives met in conference from time to time to discuss their proposals.

7. On or about May 13, 1984, TWA invoked the services of the National Mediation Board ("NMB") to assist the parties, through mediation, in reaching agreement. The NMB docketed the dispute and, on or about July 12, 1984, appointed a mediator to assist the parties in their negotiations.

8. No agreement had been reached in the IFFA-TWA negotiations by February 4, 1986 and on that date, the NMB notified TWA and IFFA that the 30-day "cooling off" period had begun.

9. Pursuant to the NMB's notification, if the parties were unable to arrive at a mutually acceptable agreement by midnight, March 6, 1986, both parties would be free to resort to self-help.

10. On March 5, 1986, IFFA commenced Civil Action No. 86-6030-CV-SJ-6 in the United States District Court for the Western District of Missouri.

11. TWA and IFFA were unable to reach agreement by midnight, March 6, 1986.

12. IFFA commenced a strike against TWA in the first hour of Friday, March 7, 1986.

13. Commencing March 7, 1986, and since then, TWA has made various changes in flight attendant rates of pay, rules and working conditions without agreement by IFFA.

14. Exhibit 5 attached hereto is a true and accurate copy of a letter delivered at 10:00 P.M., May 17, 1986, by IFFA's President, Victoria Frankovich to TWA's Vice President—Labor Relations, J.W. Hoar.

15. Exhibit 6 attached hereto is a true and accurate copy of a letter delivered on May 18, 1986, by IFFA's President, Victoria Frankovich to TWA's Vice President—Labor Relations, J.W. Hoar.

16. Exhibit 7 attached hereto is a true and accurate copy of a letter delivered on May 20, 1986, by J.W. Hoar to Victoria Frankovich.

17. Exhibit 8 attached hereto is a true and accurate copy of a letter delivered on May 21, 1986 by Victoria Frankovich to J.W. Hoar.

18. TWA's business records show that at various times in the weeks preceding the commencement of the strike, it sent mailgrams identical to the example attached hereto as Exhibit 9 (or other written communications substantially similar in content, attached as Exhibit 10-A, B and C hereto) to approximately 1,500 individuals who had completed flight attendant training at TWTC on or before March 6, 1986.

19. TWA's business records show that during the first several days of the strike approximately 1,274 individuals who received Exhibit 9 or 10 were hired as flight attendants. Regardless of their date of report, they were all assigned line seniority dates of March 7, 1986, with the exception of a few who received Exhibit 10-C, and postponed their dates of report.

20. TWA's business records show that as of May 17, 1986, of the original 1,274 flight attendants hired during the first several days of the strike, approximately 1,220 were still working as flight attendants. Of this number, approximately 62 were

domiciled in Boston, 260 in New York, 515 in St. Louis, 272 in Los Angeles, and 111 in San Francisco.

21. Individuals who began training on and after March 10, 1986 at the TWTC were hired as TWA employees on their first day of training. Beginning on or about March 10, 1986, individuals who were then enrolled in the TWTC and who had entered training prior to March 8, 1986, were informed that they were TWA employees effective March 8, 1986. True copies of blank forms to be completed by and materials furnished to individuals hired on and after March 8, 1986 are attached as Exhibit 11 hereto.

22. Exhibit 12 attached is a true and accurate copy of an outline provided by TWA to instructors of flight attendants for use during the first week or ten days of the strike.

23. TWA's business records show that after the first several days of the strike approximately 1,590 additional individuals were hired. Of this number, TWA's records show that approximately 1,127 had completed initial flight attendant training as of May 17, 1986, and approximately 463 had not completed initial flight attendant training at TWTC as of May 17, 1986.

24. The approximately 463 individuals who had not completed initial flight attendant training as of May 17, 1986, were hired and trained in anticipation of flight attendant vacancies that were expected to open in June, 1986. Some of said trainees who had completed training after May 17, 1986 were used as active flight attendants beginning the last week of May, during the transition period into the peak June schedule.

25. TWA's business records show that all of the flight attendants who were newly-hired after the commencement of the strike, and who actually worked one or more flights as active flight attendants, were classified as "cabin attendants" as distinguished from "flight pursers" or "service managers."

26. TWA's business records show that approximately 1,284 individuals who were employed as flight attendants immediately prior to the commencement of the strike crossed the IFFA picket lines and reported to work before 10:00 P.M., May 17,

1986. The breakdown of this group (which shall be referred to as "crossovers") by domicile and job category is as follows:

Domicile	*Service Managers*	*Cabin Attendants*	*Total*
Boston	23	5	28
New York	160	388	548
St. Louis	47	441	488
Los Angeles	62	99	161
San Francisco	28	31	59
	320	964	1,284

* * *

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
MAY 15 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1650

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

TRANS WORLD AIRLINES, INC.,
Petitioner,

v.

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

STEVEN A. FEHR
(Counsel of Record)
WILLIAM A. JOLLEY
JOLLEY, WALSH, HAGER & GORDON
204 West Linwood Blvd.
Kansas City, Missouri 64111
(816) 561-3755
Attorneys for Respondent Independent Federation of Flight Attendants

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Under the Railway Labor Act, may an air carrier, during self-help, unilaterally implement changes in working conditions governed by the existing collective bargaining agreement, when such changes were not the subject of the Act's processes calling for notice, negotiation, mediation, and release, and when such changes are not necessary in order for the carrier to continue operations during a work stoppage?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
ARGUMENT	5
I. Certiorari Should Not Be Granted Because The Factual Determinations Made By The Courts Below Render The Underlying Statutory Issue Irrelevant To The Outcome Of This Case; Review By This Court Would Merely Be An "Advisory Opinion"	5
II. The Decision Below Is Not "At Odds" Or In Conflict With Other Decisions Of The First, Second, Seventh, And Ninth Circuits	8
CONCLUSION	12

TABLE OF AUTHORITIES

Cases	Page
ALPA v. Pan American World Airways, 765 F.2d 377 (2nd Cir. 1985)	10
ALPA v. United Air Lines, 809 F.2d 886 (7th Cir. 1986), *cert. den.*, —— U.S. ——, 107 S.Ct. 1605 (1987)	11
AT&T Technologies, Inc. v. CWA, —— U.S. ——, 106 S.Ct. 1415 (1986)	8
BRAC v. FEC Railway Co., 384 U.S. 238 (1966)	3, 5, 10
EEOC v. United Air Lines, 755 F.2d 94 (7th Cir. 1985)	8, 11
FEIA v. Eastern Air Lines, 359 F.2d 303 (2nd Cir. 1966)	10
IAM v. Aloha Airlines, 776 F.2d 812 (9th Cir. 1985)	9, 10
IAM v. Northeast Airlines, Inc., 536 F.2d 975 (1st Cir. 1976)	9
IAM v. Reeve Aleutian Airways, 469 F.2d 990 (9th Cir. 1972), *cert. den.*, 411 U.S. 982 (1973)	6, 8, 9, 11
IFFA v. TWA, 643 F.Supp. 470 (W.D. Mo. 1986) (Appeal Pending)	4
Manning v. American Airlines, 329 F.2d 32 (2nd Cir. 1964), *cert. den.*, 379 U.S. 817	10
The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180 (1959)	7
Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955)	7

Statutes	
Railway Labor Act, 45 U.S.C. §§ 151, *et seq.*	*passim*
Section 2, Seventh, 45 U.S.C. § 152, Seventh	3, 5, 10
Section 2, Eleventh, 45 U.S.C. § 152, Eleventh	10
Section 5, 45 U.S.C. § 155	2
Section 6, 45 U.S.C. § 156	*passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1650

TRANS WORLD AIRLINES, INC.,
Petitioner,

v.

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Trans World Airlines, Inc., and the Independent Federation of Flight Attendants (hereinafter "TWA" and "IFFA") are parties to a collective bargaining agreement signed in April of 1983. Article 28 of that contract states in part:

> Except as otherwise specified in this Agreement, this entire Agreement shall be effective August 1, 1981, shall remain in effect until July 31, 1984 and thereafter shall renew itself without change for yearly periods unless written notice of intended change is served in accordance with Section 6, Title 1 of the

Railway Labor Act, as amended, by either party hereto, at least 90 days prior to the renewal date in each year. (Pet. App. 2a, 78a).[1]

In 1984, the parties exchanged § 6 (45 U.S.C. § 156) notices and began the statutory process under the Railway Labor Act (RLA) of negotiation and mediation through the auspices of the National Mediation Board (NMB).[2] In late January of 1986, the NMB offered binding arbitration to the parties pursuant to § 5 (45 U.S.C. § 155) but TWA refused the proffer. The parties were then released and allowed to engage in self-help as of March 7, 1986. On that date, TWA unilaterally implemented numerous new working conditions, and IFFA struck the airline. TWA did not limit its unilaterally implemented new work rules to matters which had been the subject of § 6 notices and subsequent negotiation and mediation. Among those contractual items unilaterally abrogated by TWA which were not the subject of negotiation were the "union security" provisions contained in Article 24(A-L) of the collective bargaining agreement, requiring that all working flight attendants pay dues to IFFA. (Pet. App. 2a, 3a).

On April 17, 1986, TWA filed this action seeking a declaratory judgment that the collective bargaining agreement had "expired" and that it was not obligated to observe any of its provisions, regardless of whether those provisions had been the subject of negotiations. (Pet. App. 3a, 82a). On May 17, 1986, the strike was halted, and strikers began returning to work in seniority order for available jobs. (Pet. App. 3a).

---

[1] References to TWA's Petition will be shown as "Pet. ——"; references to the Appendix to the Petition will be "Pet.App. ——a".

[2] As will be explained in our argument, because TWA's "Question Presented" and "Statement of the Case" contain inaccuracies, we felt it necessary to supply our own to the Court.

On August 1, 1986, the district court ruled in IFFA's favor, holding (1) that the RLA prohibits a carrier from making unilateral changes which were not subjected to the procedures triggered by a § 6 Notice[3]; and (2) that the contract by its terms did not expire, but was merely amendable, and under the terms of the contract itself the union security provisions were still in effect. Accordingly, the court held that TWA could make only those unilateral changes which had been specifically subjected to the processes of the RLA. (Pet. App. 3a, 30a). In holding that the contract had not expired and did not terminate but was an "amendable contract" that continued to exist, the court relied upon the language in the contract, and also upon evidence regarding the bargaining history and the parties' intent and understanding of the duration clause. (Pet. App. 40a, 41a).

TWA appealed, and the Eighth Circuit granted a temporary stay on August 14, 1986 (Pet. App. 19a), pending a further hearing on August 26, on which date the stay was significantly modified (Pet. App. 20a). However, the day of the oral argument on the merits of the appeal, October 15, 1986, the court vacated the partial stay. (Pet. App. 26a).[4]

---

[3] TWA's statutory argument is that § 2 Seventh of the RLA (which prohibits carriers from making unilateral changes in contractual working conditions except by utilizing the § 6 procedures as to those changes) and *BRAC v. FEC Railway Co.*, 384 U.S. 238 (1966), apply only to contracts that have not "expired", and that when a contract has so expired there is no limitation whatsoever upon the unilateral changes a carrier may make during self-help. The district court rejected this argument, holding that as *FEC* indicates, § 2 Seventh prohibits carriers from making unilateral changes except through the § 6 procedures, and that the RLA does not allow "[C]ontracts to completely self-destruct simply upon notice of specified proposed changes". (Pet. App. 36a).

[4] TWA refers to the fact that a "different panel" vacated the partial stay. Pet. 9, n.7. Two of the three judges who heard TWA's appeal on the merits also presided at the stay hearing held on August 26, 1986.

On January 14, 1987, the Eighth Circuit affirmed. (Pet. App. 1a). In a unanimous decision, the court agreed with the district court's construction of the contract. In doing so, the court of appeals noted not only the bargaining history relied upon by the district court, but also cited additional evidence in the record (supporting the same conclusion) not specifically mentioned in the district court opinion. (Pet. App. 8a-9a).

Because of its ruling on the effect of the contract, the Eighth Circuit twice noted (Pet. App. 5a, 18a, n. 5), that it was unnecessary to decide the statutory issue determined by the district court: whether the RLA prohibits the making of contracts with "comprehensive termination dates." (Pet. App. 36a).[5] The court noted, however, that TWA's position that a carrier during self-help could make any unilateral change it wished, regardless of whether those changes had been subjected to the processes of the RLA, would "[C]ompletely undermine the collective bargaining nature of the Act . . . ." (Pet. App. 17a); and "[W]ould cut out the very heart of the Railway Labor Act—collective bargaining . . . ." (Pet. App. 17a-18a); and would "(frustrate) the basic purpose of the RLA . . . ." (Pet. App. 18a); and would allow TWA to "[F]lout the entire purpose of the RLA . . . ." *Id.*[6]

---

[5] Simply put, since TWA's statutory argument is premised entirely on the assumption that the contract "expired", and since both courts held that the contract did not expire, there was no need to decide the statutory issue.

[6] Contrary to TWA's assertions, IFFA is not (in other litigation) attempting to "remove the dues-payers from their jobs." IFFA is merely making arguments, as many unions do, that the employer has acted illegally, and that if there is a temporary limit to available jobs, seniority should play a role in determining who gets those jobs. Indeed, the district court has found that TWA has illegally refused to reinstate 463 strikers to their jobs. *IFFA v. TWA*, 643 F.Supp. 470 (W.D. Mo. 1986) (appeal pending).

ARGUMENT

I. Certiorari Should Not Be Granted Because The Factual Determinations Made By The Courts Below Render The Underlying Statutory Issue Irrelevant To The Outcome Of This Case; Review By This Court Would Merely Be An "Advisory Opinion".

The district court held that under both the contract and the RLA, TWA was prohibited during self-help from making unilateral changes in working conditions embodied in the preexisting collective bargaining agreement, other than those changes which TWA had specifically submitted to the bargaining processes of the RLA (and other changes necessary to continue operations during a work stoppage). The Eighth Circuit affirmed, but limited its holding to the effect of the contract, finding it unnecessary to address the underlying statutory issue. This result is hardly "startling". (Pet. 2).[7] To the contrary, it was clearly preordained by the contract, as well as the explicit language of § 2 Seventh of the RLA (45 U.S.C. § 152 Seventh) and this Court's opinion in *BRAC v. FEC Railway Co.*, 384 U.S. 238 (1966).[8]

TWA's main argument in support of *certiorari* is that a conflict exists between the Eighth Circuit decision be-

---

[7] TWA's "Question Presented" is inaccurate and incomplete. One critical fact is simply misrepresented: the collective bargaining agreement is *not* for a "stated term," since both the district court and the court of appeals held that the contract was an amendable contract which did not terminate. A second crucial fact is just ignored: that the unilateral changes at issue here were never made the subject of bargaining by TWA.

[8] In *FEC*, the Court said that allowing the carrier to make unilateral changes which were not the subject of bargaining would give the carrier an incentive to provoke a strike on a narrow ground and then refuse to settle. "The processes of bargaining and mediation called for by the Act would indeed become a sham if a carrier could unilaterally achieve what the Act requires be done by the other orderly procedures." 384 U.S. at 247.

low and *IAM v. Reeve Aleutian Airways*, 469 F.2d 990 (9th Cir. 1972), *cert. den.*, 411 U.S. 982 (1973). In *Reeve*, the Ninth Circuit affirmed the district court's finding that the contract had expired, and held that the contract *and* the statute allowed the carrier to make changes, including changes other than those over which it had bargained. Here, the Eighth Circuit held only that the contract had *not* expired; and that the contract allowed TWA to make only those changes as to which it had bargained to impasse and exhausted the dispute resolution procedures of the RLA. The Eighth Circuit thus found it unnecessary to address the district court's conclusion that the RLA itself did not allow a carrier to make unilateral changes in contractual working conditions which were not the subject of bargaining.[9]

As the Eighth Circuit noted, the finding that the collective bargaining agreement here did not expire and remains in effect makes resolution of the underlying statutory issue unnecessary, because it is irrelevant to the outcome of this case. Although the court of appeals found additional evidence to support the district court's conclusion that the contract had not terminated, it was, of course, not really in a position to reverse this factual determination. This Court also has no basis upon which to disturb this controlling finding of fact. Thus, granting *certiorari* is not warranted because it could not result in a reversal, even if the Court agreed with TWA's view of the law.

[9] From the outset of this litigation, it has been TWA's position that the contract has "expired"; that TWA was not bound by any of the contract's terms; and that TWA could unilaterally change any and all working conditions at will, regardless of whether TWA had subjected the particular changes to the processes of the RLA. See, *inter alia*, Pet. App. 3a, 17a, 18a, 37a, 94a. In its Petition however, TWA seems to shift focus and hope that this Court will consider only the question of whether working flight attendants are obligated to pay dues. It matters not. The issues which determine whether the union security clause is still in effect, also determine whether TWA can make any other unilateral changes (over which it did not bargain) at will.

This Court is not in the habit of granting *certiorari* in order to render advisory opinions. As the Court said in *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180 (1959), while dismissing as improvidently granted a writ of *certiorari*:

> While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution here of the extent to which these bill of lading provisions may be given effect by our courts can await a day when the issue is posed less abstractly. (359 U.S. at 184).

Similarly, in *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955), Justice Frankfurter said:

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. (349 U.S. at 74).

In this regard, we must bring the Court's attention to TWA's dubious claim that the Eighth Circuit's holding on the "[C]onstruction of the duration clause did not flow from a reading of the language agreed to by the parties, findings as to their intent in adopting it, or custom and practice in the airline industry." (Pet. 8). This statement is plainly wrong on all three counts. The Eighth Circuit quoted in its entirety the district court's conclusions flowing from a reading of the contractual language, and stated its agreement. (Pet. App. 13a-15a). The court also noted with considerable detail (even more than the district court) the evidence regarding the intent of the parties. (Pet. App. 8a-9a). Moreover, ex-

amination of the cases cited by TWA unearths not a single airline collective bargaining agreement which uses the word "expire" or any case (other than *Reeve*), which even suggests that once self-help begins, an air carrier is free to make unilateral changes at will (without regard to what the subjects of bargaining have been).

Finally in regard to *Reeve*, TWA's emphasis on the similarity of the *Reeve* duration clause compared to the one here (Pet. 20) is unavailing; the clauses are *not* identical. The *Reeve* clause does not include the word "entire" which was found to be significant here. Moreover, the *Reeve* courts simply seem to have assumed, without actually considering, that the contract "expired". (Pet. App. 12a-13a).[10] In addition, in *Reeve*, there is no indication that the union presented any evidence regarding the bargaining history or the parties' intent, in stark contrast to the record here.[11] This case turns upon its own facts, and there is no conflict with *Reeve*.

II. The Decision Below Is Not "At Odds" Or In Conflict With Other Decisions Of The First, Second, Seventh, And Ninth Circuits.

Beyond *Reeve*, TWA briefly contends that the Eighth Circuit decision here is in conflict with another Ninth Circuit decision, and with decisions of the First, Second, and Seventh Circuits. But as the discussion *infra* will

---

[10] Indeed, every court which has discussed the specific holding in *Reeve* has openly questioned the factual determination that the contract there expired. *See EEOC v. United Air Lines*, 755 F.2d 94, 98 (7th Cir. 1985); Pet. App. 12a, 37a, n.7.

[11] TWA also briefly hints it would now like to arbitrate the meaning of the duration clause, even though it was the plaintiff and asked the district court to rule on the meaning of the clause. In any event, issues which deal with the existence of a contract *per se* are properly decided by the district court. *AT&T Technologies v. CWA*, —— U.S. ——, 106 S.Ct. 1415 (1986). Without question, the decision here dealt with the existence of the contract.

demonstrate, all such cases are either irrelevant to or support the ruling here.

Ninth Circuit

The only other Ninth Circuit case cited by TWA is *IAM v. Aloha Airlines*, 776 F.2d 812 (9th Cir. 1985). There the Ninth Circuit did cite its earlier opinion in *Reeve*, and did refer to a "termination date." However, *Aloha* did not deal with what a carrier could do during self-help. Instead, it dealt with whether the collective bargaining agreement, or an interim agreement which by its terms was due to end, was to be the status quo in effect until the parties received their release from the NMB. Accordingly, the question in *Aloha* was only which of the two agreements the parties had made was to be in effect despite the fact that both had arguably expired. The Ninth Circuit in *Aloha* had no occasion whatsoever to reexamine the question of whether during self-help a carrier could change at will working conditions over which it had not bargained.

First Circuit

Reeve Aleutian is also cited in *IAM v. Northeast Airlines, Inc.*, 536 F.2d 975 (1st Cir. 1976) in a footnote at the end of the opinion which is clearly dicta (536 F.2d at 978, n. 2). *Northeast* dealt with a merger situation and the obligations of the surviving airline to deal with the union representing the employees of the airline absorbed. In speculating upon whether the airline would be obligated to arbitrate certain matters, the court volunteered that "in general" collective bargaining agreements under the RLA were "not controlling" after the expiration of the "status quo" period, citing *Reeve*. We agree, and so would the courts below. It is the contract as modified by matters which have run the statutory course of § 6 notice, negotiation, mediation, release, and carrier implementation, which controls.

Second Circuit

Manning v. American Airlines, 329 F.2d 32 (2d Cir.), *cert. den.*, 379 U.S. 817 (1964), and *ALPA v. Pan American World Airways*, 765 F.2d 377 (2d Cir. 1985), like *Aloha*, deal only with the question of what terms are to be in effect during the "status quo" period prior to NMB release. Neither case discusses what a carrier may do during self-help. In fact, *Manning* hurts TWA's position significantly by making it clear that a union security agreement is a "working condition" subject to the prohibitions of § 6; surely then it is also a working condition subject to the prohibitions of § 2 Seventh.[12] In *Pan Am*, the court merely gave effect to what it characterized as an "explicit agreement" as to what would be the conditions of employment during the status quo period prior to self-help. 765 F.2d at 382. This also has nothing to do with the question of whether during self-help, a carrier may (*without* any agreement), alter working conditions at will without regard to which matters it has subjected to the bargaining process.

The final Second Circuit case is *FEIA v. Eastern Airlines*, 359 F.2d 303 (2d Cir. 1966). The language from *FEIA* which TWA relies upon is clearly dicta; the court had already disposed of the plaintiff's claims on other grounds. Moreover, *FEIA* is inherently suspect because it pre-dates this Court's opinion in *FEC*, as the Eighth Circuit noted. (Pet. App. 11a). As the Eighth Circuit also made clear, *FEIA* did not discuss the issues presented here. (*Id.*)

---

[12] As *Manning* seems to make clear, there is nothing in § 2 Eleventh or any other provision of the RLA which makes the altering of a union security clause different from the altering of any other contractually-governed working condition or term of employment. A reading of *FEC* requires the same conclusion, since "union shop" was one of the provisions the carrier there unilaterally changed without utilizing the statutory procedures. 384 U.S. at 245. At any rate, the finding that the contract did not terminate moots any possible argument regarding § 2 Eleventh.

Seventh Circuit

EEOC v. United Air Lines, Inc., supra, 755 F.2d 94 (7th Cir. 1985), strongly supports the decision below. The court found that its decision was not in conflict with *Reeve* because the contract at issue in *EEOC* was an amendable contract which had not expired. 755 F.2d at 98-99. The courts here made the same finding and distinction. (Pet. App. 13a-15a, 37a-40a).

The other Seventh Circuit case is *ALPA v. United Air Lines*, 809 F.2d 886 (7th Cir. 1986), *cert. den.*, —— U.S. ——, 107 S.Ct. 1605 (1987). As the Eighth Circuit indicated (Pet. App. 11a, n.3), that case does not really deal with the issues presented here, but to the degree it does, it supports the district court's statutory ruling by imposing limits on a carrier's right to self-help even after a contract has "expired." In any event, to the extent it characterizes the contract there as expired, it is clearly distinguishable from this case where a contrary finding was made.

Summary

Clearly, none of these cases creates a conflict with the decision below. Only the Seventh Circuit cases even deal with the question of what a carrier may do during self-help, and to the extent they touch on relevant subjects, the Seventh Circuit cases support the Eighth Circuit. None of the contracts involved in the cases cited by TWA contain duration clauses with precisely the same language as that in the IFFA-TWA contract; and the factual determination made here that the contract did not expire, and that the union security clause is still in effect, makes this case unique to its facts, and also controls its outcome.

CONCLUSION

Since no actual conflict is presented with the decision of any other circuit, and since this case clearly was determined based upon its own particular facts, *certiorari* should not be granted.

Respectfully submitted,

STEVEN A. FEHR
(Counsel of Record)
WILLIAM A. JOLLEY
JOLLEY, WALSH, HAGER & GORDON
204 West Linwood Blvd.
Kansas City, Missouri 64111
(816) 561-3755
Attorneys for Respondent
Independent Federation of
Flight Attendants

REPLY BRIEF

No. 86-1650

Supreme Court, U.S.
FILED
JUN 1 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1986

TRANS WORLD AIRLINES, INC.,

Petitioner,

v.

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY BRIEF

MURRAY GARTNER
PROSKAUER ROSE GOETZ & MENDELSOHN
300 Park Avenue
New York, New York 10022
(212) 909-7000

Counsel of Record for Petitioner

PAUL E. DONNELLY
STINSON MAG & FIZZELL
P.O. Box 19251
Kansas City, Missouri 64105

MARK A. BUCKSTEIN
MICHAEL A. KATZ
605 Third Avenue
New York, New York 10158

Attorneys for Petitioner

Of Counsel
Carole O'Blenes

TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Argument	2
A. The need for review of the decision below is highlighted by the Eighth Circuit's recent use of it to unsettle even further long-accepted principles of labor law	2
B. Respondent's brief in opposition to the petition avoids the real issue by attempting to make this a different case	5
Conclusion	10

TABLE OF AUTHORITIES

Cases:	PAGE
Brotherhood of Railway & Steamship Clerks v. *Florida East Coast Railway*, 384 U.S. 238 (1966)	2, 10
Burlington Northern Railroad v. *Brotherhood of Maintenance of Way Employees*, 107 S. Ct. 1841 (1987)	9, 10
International Association of Machinists v. *Reeve Aleutian Airways*, 469 F.2d 990 (9th Cir. 1972), *cert. denied*, 411 U.S. 982 (1973)	*passim*
NLRB v. *Erie Resistor Corp.*, 373 U.S. 221 (1963)	*passim*
NLRB v. *Fleetwood Trailer Co.*, 389 U.S. 375 (1967)	3
NLRB v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938)	*passim*
Sampson v. *Murray*, 415 U.S. 61 (1974)	9
United States v. *Sisson*, 399 U.S. 267 (1970)	9
Vulcan Hart Corp. v. *NLRB*, 718 F.2d 269 (8th Cir. 1983)	3

Statutes:

Railway Labor Act

Section 2, Fourth, 45 U.S.C. § 152, Fourth 2, 7, 10

Section 2, Eleventh, 45 U.S.C. § 152, Eleventh 2, 7, 10

IN THE

Supreme Court of the United States

OCTOBER TERM 1986

No. 86-1650

TRANS WORLD AIRLINES, INC.,

Petitioner,

v.

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Respondent.

PETITIONER'S REPLY BRIEF

The Eighth Circuit's most recent decision in the IFFA-TWA litigation[1] demonstrates that the decision that is the subject of this petition is already spawning a unique and disparate body of labor law which clearly is peculiar to that Circuit and contrary to long-established national labor law. The uses to which the court below is putting its decision that union security clauses survive the contract of which they were a part provide further compelling reasons to grant the writ.

So far as the case on this petition is concerned, Respondent, in an obvious attempt to minimize the issue before the Court, misstates the question presented, mischaracterizes the proceeding and decision below, and relies on nonexistent "factual" distinctions to erase a clear conflict between the Eighth and

---

1 *Independent Federation of Flight Attendants* v. *Trans World Airlines*, Nos. 86-2197 and 86-2319 (8th Cir., May 26, 1987) (Bright, Sen. Cir. J.), a copy of which is attached to this brief as Appendix A. (Appendix A is referred to as "___ A.")

Ninth Circuits. Respondent's brief completely ignores the special nature of union membership requirements, and the limitations imposed on them by Congress in RLA Section 2, Fourth and Eleventh, and fails to address the compelling need for guidance from this Court concerning the proper application of its decision in *Brotherhood of Railway & Steamship Clerks* v. *Florida East Coast Railway*, 384 U.S. 238 (1966) ("*FEC*").

ARGUMENT

A. The need for review of the decision below is highlighted by the Eighth Circuit's recent use of it to unsettle even further long-accepted principles of labor law.

It is no longer necessary to speculate about the broad and destabilizing effects on labor relations if the decision below is allowed to stand. The Eighth Circuit has already applied it to subvert a principle stated by this Court nearly fifty years ago, to deprive TWA of one of its principal self-help weapons (*i.e.*, the right to retain permanent employees who choose not to strike), and to extinguish the protected right of some 1,700 flight attendants to refrain from engaging in concerted activity against their employer.

Relying on its holding in this case that the union security clauses are still in effect, the court below, reversing the district court, has now held that some 1,300 flight attendants, who were permanent employees of TWA before the strike began and who exercised their protected right not to join the strike (or to abandon it and return to work before the strike ended), have *less* protection against displacement than newly hired replacements and must yield their jobs in order to create vacancies for more senior "full-term" strikers. (7-11A) The Eighth Circuit also relied on the holding in this case to support its conclusion that approximately 400 flight attendants, hired by TWA as permanent replacements and already in training (some for over two weeks) when the strike ended, must be displaced in order to make room for "full-term" strikers. (11-15A)

In support of those unprecedented and unsupportable conclusions—which would radically alter the balance of bargaining power between management and unions in the future—the court below offered no sound reason or authority.[2] Indeed, the court began its opinion by disingenuously characterizing the issue before it as one of "preference in employment" (2A), as if there were vacant positions to be filled, when in fact all the flight attendants in question were permanently employed by and working for TWA before the full-term strikers offered to return to work. It then went on to use the holding in this case to distort and misapply this Court's decisions in *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938) ("*Mackay*") and *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963) ("*Erie Resistor*").

The Eighth Circuit acknowledged that "economic strikers are entitled to reinstatement only as vacancies occur," and that an employer "is not required to discharge permanent replacements in order to rehire striking employees." (5A) It cited no authority (and there is none) for the view that TWA was obligated to *create* vacancies for "full-term strikers" by displacing permanent employees—whether new hires, former strikers or non-strikers[3]—and, purporting to rely on *Mackay*, it held, in effect, that only new hire permanent replacements, not "cross-overs," could retain their jobs at the end of a strike.

Fundamentally misstating the issue, the court said the "cross-overs" could not be "considered permanent replacements" because "the union security clause . . . remains in effect . . ."; "all cross-overs must retain their union membership"; and "TWA may not accord cross-overs permanent replacement status and prevent full-term strikers from displac-

---

2 The sole reason suggested by the Eighth Circuit for affording cross-overs less protection than new hires is the remarkable one that "new hires cannot be the subject of discrimination based upon union loyalty and activity." (7A, n.4)

3 Economic strikers are entitled to reinstatement only "[i]f and when" vacancies are available. *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 381 (1967); *see also, e.g.*, *Vulcan Hart Corp.* v. *NLRB*, 718 F.2d 269, 274-75 (8th Cir. 1983).

ing cross-overs with less seniority because such action impermissibly discriminates against union members based on the degree of their union activity." (7A)[4] Awarding permanent status to cross-overs, it said, like the "super-seniority" at issue in *Erie Resistor*, "induces employees to abandon the strike and is likely to create long-term conflict and division within the workforce of those working together under the union security clause." (9A)[5]

TWA, however, did not "award" permanent status to the cross-overs. They were permanent employees before the strike started. They did not need to be "replacements"; they simply continued to work for TWA, thereby preventing vacancies in their jobs.

Nothing that this Court said in *Erie Resistor*, moreover, or in any other decision, even suggests that it is "discrimination" on the basis of "union activity" for an employer to decline, at the conclusion of a strike, to displace those who worked during the strike in order to create places for returning strikers. On the contrary, in *Erie Resistor*, where the employer before it had operated during a strike with *both* strike replacements and former strikers who had abandoned the strike, this Court said: "an employer may operate his plant during a strike and at its conclusion need not discharge *those who worked during the strike* in order to make way for returning strikers." 373 U.S. at 232 (emphasis added).

---

4 At no point in its opinion does the Eighth Circuit identify the source of its apparent view that strikers must be reinstated in seniority order. *See, e.g., Mackay, supra*, 304 U.S. at 347.

5 What the court calls an "induce[ment] . . . to abandon the strike" is of course nothing more than the desire of the cross-overs to protect their jobs. And the "division within the workforce" to which it refers was created not by TWA, but by the free and protected choice of flight attendants to participate, or not to participate, in the strike. Those undesirable effects, according to this Court in *Erie Resistor*, resulted from the award of "super-seniority" (which the court below acknowledged was not done in this case), and not from the retention of employees who worked during the strike. 373 U.S. at 231.

The Eighth Circuit, however, used its union security decision to postulate a pool of union members who had a continuing right to the struck jobs in seniority order, to be exercised when the strike was over, regardless of whether some of them ("cross-overs") had continued to work during the strike so that the jobs they filled were not vacant at the end of the strike. That view of strikers' rights is directly contrary to this Court's acceptance in *Mackay* and *Erie Resistor* of the right of employees who work during a strike to remain in their jobs, and even the Eighth Circuit acknowledged that replacements *and* cross-overs were involved in *Erie Resistor*. (8A)

If the continued existence of the union security clauses during and after a strike that ends without agreement has the bizarre effect of preventing existing employees from protecting their own jobs by continuing to work, then it is all the more urgent to review the question presented by this petition, *i.e.*, whether the union security clauses do indeed survive. The net effect of both decisions of the Eighth Circuit taken together is to force all union members to support a strike whatever their personal desires and to force employers to replace all strikers with new hires rather than to retain the willing experienced employees they would prefer.

B. Respondent's brief in opposition to the petition avoids the real issue by attempting to make this a different case.

It is remarkable that in an action brought because of the union's demand for enforcement of union security provisions, the union tries to make it appear that that question is barely present in the case and that the case is really about changes in other conditions of employment.

1. In its statement of the "Question Presented" and in its "Statement of the Case," Respondent tries to make this a different case in order to avoid the obvious conflict with the decision of the Ninth Circuit in *IAM* v. *Reeve Aleutian Airways*, 469 F.2d 990 (9th Cir. 1972), *cert. denied*, 411 U.S. 982 (1973) ("*Reeve Aleutian*"). This case presents no general

question of whether, as Respondent says, "an air carrier, during self-help, [may] unilaterally implement changes in working conditions . . . when such changes were not the subject of the Act's processes calling for notice, negotiation, mediation and release . . . ." (Resp. i)[6]

On the contrary, as the pleadings establish, Petitioner sought a declaratory judgment that "TWA has no continuing obligation to treat the union security or related provisions of the expired 1983 Agreement as having current effect" (94a), and Respondent's answer, similarly, sought a judgment "declaring that plaintiff is legally obligated to comply with the union security provisions of the contract as embodied in Article 24 (A-L) of the collective bargaining agreement." (107a) TWA did *not* file this action "seeking a declaratory judgment that the collective bargaining agreement had 'expired' and that it was not obligated to observe any of its provisions, regardless of whether those provisions had been the subject of negotiations." (Resp. 2)[7]

This case presents the single question, as stated in the petition, whether "[a]fter the stated term of a collective bargaining agreement[8] . . . the Railway Labor Act (unlike the

6 Respondent's brief in opposition to the petition is referred to as "Resp. ____." The petition is referred to as "Pet. ____"; and the appendices to the petition, as "____a."

7 There is absolutely no support in the record for Respondent's statement that "the 'union security' provisions contained in Article 24 (A-L)" were "[a]mong those contractual items unilaterally abrogated by TWA which were not the subject of negotiation." (Resp. 2) There is no evidence in the record that TWA "abrogated" any other provision of the old contract which had not been subject to negotiation.

8 It cannot reasonably be disputed that the 1981-84 agreement was for a stated term, *i.e.*, from August 1, 1981 to July 31, 1984. And, semantics aside, that agreement (even on the Eighth Circuit's view of it) did end on July 31, 1984. Whatever "mutilated collective bargaining agreement" (39a, n.8) the court below held to exist after that date, it most certainly was not the 1981-84 agreement.

(*footnote continued*)

National Labor Relations Act) mandate[s] that the carrier enforce the union security provisions of . . . that agreement." On that question there can be no doubt that the decision of the Eighth Circuit is in direct conflict with the decision of the Ninth Circuit.

2. Respondent claims that this case "clearly was determined based upon its own particular facts" (Resp. 12), but those facts are legally indistinguishable from the facts in *Reeve Aleutian*. As pointed out on pages 19 and 20 of the petition, the duration clause in both cases was essentially the same. Where two courts reach radically different legal conclusions from the same basic facts, there is a conflict, even though one court purports to find that the facts it is considering are different.

In the face of the explicit language of the duration clause that the agreement would renew itself *unless* a Section 6 notice was served, the court below held that the agreement was partially renewed even though such a notice was served, rather than acknowledging as the Ninth Circuit and the Seventh Circuit did that service of a notice of any change causes the agreement to lapse. The court below said that TWA itself was aware that it had served a notice to change and not a notice to terminate the agreement. But under the agreement a notice of change *was* a notice to terminate. The agreement provided explicitly that it would not be renewed if a notice to change was served.

For the Eighth Circuit to take such a duration clause and to purport to find in it an agreement for partial renewal, where the Ninth Circuit and the Seventh Circuit found an agreement to terminate or to cause the agreement to lapse, can only be

(*footnote continued from previous page*)

The question remains, therefore, whether the "mutilated . . . agreement" imposed on the parties by the court below satisfies the prohibition of RLA Section 2, Fourth and Eleventh, against union membership requirements and dues check-off except when codified in an existing and voluntary agreement within the meaning of Section 2, Eleventh. (*See* Pet. 11-16)

described as a conflict in legal result. There is no fact present in this case derived from the bargaining history, the understanding of the parties or any other source that justifies a different construction of the same words.

The word "entire", modifying "agreement", is not a relevant different fact, because it is indisputably tied to the clauses establishing effective dates, and *cannot* be read with the renewal clause to mean "partial agreement".[9] The limited nature of TWA's reopener notice is not a relevant different fact because, in *Reeve Aleutian*, the carrier had served no reopener notice at all and the Ninth Circuit found a limited reopener notice by the union sufficient to prevent renewal of the agreement. 469 F.2d at 992-93. The statement in the Jolley affidavit that "TWA officials and representatives referred to the 'amendable' date of the agreement and spoke in terms of that agreement 'becoming amendable' " is not a relevant different fact because that is not the equivalent of saying that if the agreement was not amended, it would remain partially in effect.[10] The purported construction of the duration clause

9 The agreement was signed on August 12, 1983, but was made retroactive to August 1, 1981, "except" for those provisions that had later effective dates (*e.g.*, Article 4 and Article 22(A), which were effective March 5, 1983). (56a, 66a) The "except" clause also took into account Article 27, under which certain events (*e.g.*, the introduction of new equipment, or a merger or acquisition), "irrespective of any provisions of Article 28 (Duration)," would subject all or part of the agreement to renegotiation *before* July 31, 1984. (76-78a)

10 The "construction" Respondent describes as that of an " 'amendable contract' that continued to exist" (Resp. 3) was not possible unless the court ignored and read out of the contract, as it did, the specifically stated effective dates. There is absolutely nothing in the duration provision itself or in the evidence presented to the court to permit the alleged "construction" that the plain statement that "the entire Agreement" shall be renewed means that *parts* of the agreement shall be renewed if notice of intended change is not served as to those parts. That reading is not a construction of the duration clause, but a rewriting, transparently intended to affect this Court's exercise of its certiorari power by making it appear that a conflict, which clearly exists because of the legal effect of the court's decision based on the same language as was present in *Reeve Aleutian*, does not exist because that language is arbitrarily said to be not the same.

therefore stands exposed as simply a different reading of the same words, without any difference in the surrounding facts, a reading which the court said it was compelled to make not by the facts, but by the Railway Labor Act.

3. It does not matter what camouflaging labels or disclaimers the court below attached to its legal conclusion. Whether this Court should grant certiorari on the question presented should be determined " 'not by the name the court gave [its decision] but by what in legal effect it actually was.' " *United States* v. *Sisson*, 399 U.S. 267, 279 n.7 (1970); *see also Sampson* v. *Murray*, 415 U.S. 61, 86-87 (1974). The decision below—driven as it was by the court's erroneous view of the statutorily required result—should be reviewed for what it is: a construction of the Railway Labor Act in direct conflict with that of another Circuit.

4. Whatever the facts, moreover, the two courts have announced diametrically opposed constructions of the Railway Labor Act. The Ninth Circuit held that it is not necessary to subject all provisions of a contract to notice, mediation and release, but only to exhaust the statutory processes with respect to those provisions which the parties, or either of them, have noticed for change. The Eighth Circuit held precisely the opposite: that the Act requires *all* provisions of every contract to be subject to notice, mediation and release even though the parties have exhausted the processes of the Act with respect to those provisions that they would change in any new agreement[11] and have completed the status quo period with respect to all terms and conditions of employment embodied in the old agreement. For that reason, it purported to construe the

11 The Eighth Circuit's statements that the RLA "requires stable and continuing agreements between management and labor" are particularly questionable in light of this Court's recent holding that "if the parties exhaust [the statutory] procedures and remain at loggerheads, they may resort to self-help in attempting to resolve their dispute, *subject only to such restrictions as may follow from the invocation of an Emergency Board under § 10 of the RLA.*" *Burlington Northern Railroad* v. *Brotherhood of Maintenance of Way Employees*, 107 S. Ct. 1841, 1851 (1987) (emphasis added).

duration clause of the TWA-IFFA 1981-84 contract as imposing that requirement, and thus imposing the continuing restrictions of the union security clauses during the self-help period,[12] even though the express terms of that clause were, and have been held by other Circuits to be, directly to the contrary.

CONCLUSION

The Eighth Circuit's conclusion that the 1981-84 agreement did not expire, and that the union security clauses are still in effect, creates a clear conflict in the Circuits that demonstrates a compelling need for guidance from this Court. Review should, therefore, be granted in order to resolve the divergent understandings of the Court's decision in *FEC*, to preserve the Congressionally established limitations on union security requirements embodied in RLA Section 2, Fourth and Eleventh, to maintain the federal interest in a uniform national labor policy, and to prevent further destabilizing of federal labor law by mischievous reliance on the decision below.

Respectfully submitted,

MURRAY GARTNER
PAUL E. DONNELLY
MARK A. BUCKSTEIN
MICHAEL A. KATZ
Attorneys for Petitioner

CAROLE O'BLENES
Of Counsel

June 1, 1987

---

12 Particularly as to union security provisions, the court below fails to appreciate that the legitimacy of the ultimate use of self-help is a motive power for agreement in free collective bargaining. As this Court has recognized, the availability of self-help measures "may increase the effectiveness of the RLA in settling major disputes by creating an incentive for the parties to settle prior to exhaustion of the statutory procedures . . . ." *Burlington Northern Railroad* v. *Brotherhood of Maintenance of Way Employees, supra*, 107 S. Ct. at 1854.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 86-2197

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
an Unincorporated Labor Organization,

Appellee,

v.

TRANS WORLD AIRLINES, INC.,

Appellant.

K. C. INTERNATIONAL AIRPORT, K. C.

No. 86-2319

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
an Unincorporated Labor Organization,

Appellant,

v.

TRANS WORLD AIRLINES, INC.,

Appellee.

K. C. INTERNATIONAL AIRPORT, K. C.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

Submitted: December 12, 1986

Filed: May 26, 1987

Before LAY, *Chief Judge*, BRIGHT, *Senior Circuit Judge*, and WOLLMAN, *Circuit Judge*.

BRIGHT, *Senior Circuit Judge*.

This appeal by Trans World Airlines, Inc. (TWA) and cross-appeal by the Independent Federation of Flight Attendants (the Union) arise from the district court's judgment determining the relative rights of strikers, new hires, cross-overs and trainees to continued employment and reinstatement following the 1986 strike by TWA flight attendants. The district court granted preference in employment to newly hired strike replacements and union members who crossed the picket lines, thereby preventing reinstatement of full-term strikers with greater seniority to those positions. For the reasons discussed below, we affirm in part and reverse in part. In essence, we grant preference in current employment only to the new hires.

I. BACKGROUND

The Union and TWA entered into a collective bargaining agreement establishing rates of pay, rules and working conditions. During the spring of 1984, the parties served upon each other notices of intended change under section 6 of the Railway Labor Act (RLA), 45 U.S.C. § 156. After extensive negotiations and following the statutory "cooling off" period, the parties were unable to agree on the changes to be made and the Union commenced a strike on March 7, 1986.

Upon commencement of the strike, TWA hired approximately 1270 new flight attendants and told them they were being offered permanent employment. These new hires were assigned seniority as of March 7, 1986. TWA also utilized approximately 1280 cross-over flight attendants (cross-overs) who were credited with their prior length of service plus whatever time they accrued by working during the strike.[1] Also

1 Cross-overs are those flight attendants who worked for TWA and were Union members prior to the strike. Some never went out on strike and others returned to work at various times during the strike. They kept their seniority as accrued prior to March 7, and also accrued additional seniority throughout the strike. At the end of the strike, they maintained their positions and TWA refused to displace them with returning full-term strikers with greater seniority.

during the strike, TWA continued to hire new flight attendants to meet expected demand. TWA advised these trainees that they were TWA employees as of the first day of training.[2] Approximately 463 trainees had not completed their training when the strike ended.

At 10:00 p.m. on May 17, 1986, the Union made an offer to return to work. Notwithstanding this offer, TWA retained its new hires and cross-overs as employees without replacement by any of those attendants who remained on strike for its duration. TWA later recalled striking flight attendants as the need then arose in order of seniority. In addition, TWA placed the 463 trainees into permanent positions when they completed their training, which was after the strike had ended. These trainees received preference in job placement over those flight attendants who had not returned to work for the duration of the strike.

The Union thereupon instituted this action in the district court claiming that TWA discriminatorily and unlawfully denied reinstatement to more than 2000 striking flight attendants after they had ended the strike and had offered to return to work.

In a previous appeal to this court arising out of this litigation, TWA challenged the continued viability of those portions of the collective bargaining agreement that were not subject to bargaining and intended change. *Trans World Airlines v. Independent Fed'n of Flight Attendants*, 809 F.2d 483 (8th Cir.), *petition for cert. filed*, Apr. 14, 1987 (*TWA* I). Particularly at issue in the prior case was the duration of the agreement as to

2 Flight attendants are not qualified to service flights until they complete a training course and an operational experience flight. Prior to March 7, trainees attended the program on a tuition-paying basis and were not offered employment until after completion of the course. After the strike began, TWA placed the trainees on its payroll as of the first day of their training.

the union security and dues check-off provisions. We held in *TWA* I that the entire bargaining agreement did not expire just because the parties reached an impasse in their bargaining about certain items of compensation, expenses and bidding procedures. *Id.* at 490. This court also decided that the union security and dues check-off provisions of the bargaining agreement remained in effect because these provisions had not been reopened in the prior bargaining sessions. *Id.* at 492. Under the union security clause that had not been reopened, all flight attendants working for TWA were required to be union members and pay union dues in order to continue their employment with TWA.

These appeals challenge the district court's rulings on cross-motions by the Union and TWA for partial summary judgment. The district court held that the flight attendants in training when the strike ended were not permanent strike replacements and must yield their jobs to strikers who returned to work. The court decided that a permanent replacement must actually perform work within a reasonable period of time and that two days was a reasonable period. Because none of the 463 trainees had completed their final training flights within two days after the strike, they did not perform services within a reasonable period of time and could not be considered permanent replacements. TWA appeals this holding in No. 86-2197.

The district court also held that the cross-overs and new hires were entitled to retain their jobs as against the claims of strikers. The Union appeals this holding in No. 86-2319.

We affirm the determination that those flight attendants holding a trainee status at the end of the strike may not be retained over striking employees. We also affirm the district court's ruling that new hires may retain their jobs as against the claims of strikers. We reverse, however, as to cross-overs. They may not retain their positions as against strikers with greater seniority.

II. Discussion

Employees who are not working because of a labor dispute remain "employees" of the employer unless they obtain other work. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378

(1967); *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345 (1938). When the labor dispute is economic in nature,[3] however, the employer may hire permanent replacements for strikers in order to continue business operations. *Mackay Radio*, 304 U.S. at 345-46. Once an employer hires permanent replacements, economic strikers are entitled to reinstatement only as vacancies occur. The employer is not required to discharge permanent replacements in order to rehire striking employees. *Id.*

A. *New Hires*

The district court held that the 1220 "new hires" who started work on and after March 7, 1986 were employed as permanent replacements and not as additions to the workforce. The district court reached its conclusion by considering the circumstances in which they were hired. The court noted that although TWA anticipated a need for new attendants regardless of a strike, once the strike began, TWA made clear that it was hiring new flight attendants to replace strikers. The new hires crossed picket lines to receive formal offers of employment and TWA had earlier informed them that if they were hired after a strike, they would be considered permanent replacements for striking employees. The court further held that the replacements' subjective understanding of their employment status was irrelevant, that is, the new hires did not need to know and understand their permanent replacement status.

The Union argues that returning strikers should have preference over new hires because the new hires were merely additions to the workforce. It contends that TWA actively recruited new attendants prior to the strike, informing them that they would be hired whether or not a strike occurred. According to

---

3 An economic strike protects wages, hours, or terms and conditions of employment. An unfair labor practice strike protests an employer's commission of unfair labor practices. *George Banta Co. v. NLRB*, 686 F.2d 10, 14 n.5 (D.C. Cir. 1982). For purposes of this lawsuit, the district court assumed, without deciding, that this strike was economic in nature. The question of whether the strike was economic or caused by unfair labor practices is the subject of separate litigation, now pending in the district court.

the Union, the new hires must be considered additions to the workforce, and not strike replacements. The Union also argues that no mutual understanding existed between the new hires and TWA that the new hires were permanent replacements for the strikers. Without a mutual understanding, the Union contends that the new hires cannot legally be deemed permanent replacements.

Although TWA's statements to new hires may have been ambiguous prior to the strike, the undisputed evidence clearly shows that once the strike began, TWA employed the new hires as permanent replacements for the strikers. These applicants were informed prior to the strike that they would be hired as strike replacements. These applicants crossed picket lines, and TWA advised them as to their role as strike replacements once they began to work. Thus, we conclude that the district court correctly determined that the 1220 new hires were employed as permanent replacements and thus were not subject to displacement by returning strikers.

We reject the Union's contention that a mutual understanding must exist between the new employees and TWA that the new hires are in fact permanent replacements. The Union argues that the new hires must have subjectively understood that they were permanent replacements in order to create the necessary mutuality of understanding.

The law, however, does not require mutuality. *NLRB v. Murray Products*, 584 F.2d 934 (9th Cir. 1978), upon which the Union relies, does not require mutual understanding. Rather, *Murray Products* holds that an employer's unilateral and undisclosed decision to designate new employees as permanent replacements is inadequate to actually accord them permanent status. *Id.* at 939. In the present case, TWA clearly communicated its decision to offer permanent employment to the new hires. Accordingly, the new hires are permanent replacements and striking employees may not displace them.

B. *Cross-overs*

The district court held that the approximately 1280 striking employees who "crossed over" and went back to work during the strike were also permanent replacements and not subject to displacement by full-term strikers with greater seniority.

The district court relied upon *Randall, Div. of Textron, Inc. v. NLRB*, 687 F.2d 1240 (8th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983), in concluding that TWA could legitimately offer cross-overs permanent replacement status. The district court noted that *Randall* and *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963), are broadly protective of employees who work during a strike and that the offer of permanency to cross-overs did not discriminate on the basis of union activity.

Upon examination of the applicable law, however, we cannot agree with the district court's assessment. Most importantly, the terms of the bargaining agreement prevent the cross-overs from being considered permanent replacements. In *TWA I*, *supra*, this court decided that those portions of the agreement not opened for bargaining were not terminated at impasse, but remained in effect. 809 F.2d at 492. Accordingly, the union security clause which provides that union membership is a condition of continued employment with TWA remains in effect. *See* 45 U.S.C. § 152, Eleventh (authorizing "closed shop" agreements).

Thus, all cross-overs must retain their union membership. TWA may not discriminate among union members based on the degree of their union activity. Accordingly, TWA may not accord cross-overs permanent replacement status and prevent full-term strikers from displacing cross-overs with less seniority because such action impermissibly discriminates among union members based on the degree of their union activity.[4]

---

4 The union security clause also requires that new hires obtain union membership in order to continue employment with TWA. New hires, however, were not union members when they began work during the strike. Thus, new hires cannot be the subject of discrimination based upon union loyalty and activity.

We note that many of the cross-overs attempted to resign from the Union. Assuming, without deciding, that *Pattern Makers' League of North America v. NLRB*, 105 S. Ct. 3064 (1985), applies to cases arising under the RLA,[5] union members may resign from all obligations except that of paying dues and the Union may not fine them for working during a strike. *Id.* at 3071 & n.16. In the present case, cross-overs have apparently ceased their union memberships except for payment of dues. This action only exacerbates the division among union members along lines of union loyalty. Furthermore, if the Union cannot penalize its members for working during a strike, neither may TWA reward those members with permanent replacement status. Accordingly, the cross-overs cannot be granted permanent replacement status because such action discriminates on the basis of union activity.

Our review of the law supports our conclusion that the cross-overs do not acquire the status of permanent replacements. In *NLRB v. Erie Resistor*, the Supreme Court upheld the NLRB's decision that an award of super-seniority to permanent replacements and cross-overs unlawfully discriminated against those who engaged in union activity. 373 U.S. at 231-32. Although TWA has not awarded super-seniority to the employees who worked during the strike, several of the concerns voiced by the Court in *Erie Resistor* are applicable to the status of the cross-overs here.

The Court disapproved of super-seniority because the award operated to the detriment of strikers as compared to non-strikers; it in effect offered an inducement to abandon the strike; and it created a long-term division among the workforce. *Id.* at 231. Although an award of super-seniority brings these concerns into a sharper focus than does the conferring of permanent replacement status to cross-overs,

---

5 In this context, the RLA's authorization of union shop agreements may be significant. Under the RLA, union members apparently need only pay dues if they so desire. *Ellis v. Brotherhood of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 439 (1984). Whether a union organized under the RLA may fine its members for working during a strike is an open question which we need not decide here.

these concerns are nonetheless present. Awarding the cross-overs permanent replacement status differentiates employees on the basis of their union activity, induces employees to abandon the strike and is likely to create long-term conflict and division within the workforce of those working together under the union security clause.

Cases that have followed *Erie Resistor* are more explicit concerning the treatment of cross-overs. In *George Banta Co. v. NLRB*, 686 F.2d 10 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983), the court stated that the nature of the benefit conferred on cross-overs was irrelevant. *Id.* at 19. Rather, an employer may not divide the workforce into those who engaged in strike activity and those who did not. *Id.*

The Seventh Circuit has held that an employee who abandons the strike and returns to his pre-strike position is not a permanent replacement. *International Ass'n of Machinists & Aerospace Workers v. J. L. Clark Co.*, 471 F.2d 694, 698 (7th Cir. 1972). The district court, however, felt that *J. L. Clark* was probably not good law in light of *Giddings & Lewis, Inc. v. NLRB*, 675 F.2d 926 (7th Cir. 1982). We do not agree. *Giddings* held that during a layoff, permanent replacements and reinstated strikers have a right of recall on the basis of seniority over unreinstated strikers. *Id.* at 930. Thus, *Giddings* in no way casts doubt on the rule that cross-overs returning to their old positions are not permanent replacements. Furthermore, the Seventh Circuit has recently approved reliance on *J. L. Clark*. *See Air Line Pilots Ass'n (ALPA) v. United Air Lines*, 802 F.2d 886, 898 (7th Cir. 1986), *aff'g*, 614 F. Supp. 1020, 1046 (N.D. Ill. 1985), *cert. denied*, 107 S. Ct. 1605 (1987).

Randall, *supra*, relied on by the district court, does not control the decision in this case. The district court determined that *Randall* implicitly approved the grant of permanency to cross-over employees. At issue in *Randall*, however, was the definition of vacancy, and the court merely upheld the NLRB's decision that the employer's practice of offering "special-rated" jobs to employees already working rather than unreinstated strikers unlawfully discriminated on the basis of union activity because Randall was offering an "additional preference besides permanence." *Id.* at 1246. The status of cross-

over employees as permanent replacements was not an issue in that case. Furthermore, *Randall* arose under the NLRA and the parties were not bound by a closed shop agreement. Thus, we deem *Randall* inapplicable to the present case.

Accordingly, we hold that unreinstated strikers are entitled to displace cross-over employees with lesser seniority.

C. *Trainees*

The district court held that the 463 trainees who had not completed their training at the time the strike ended did not become permanent replacements and thus were subject to displacement by returning strikers. The court primarily relied on *H. F. Binch Co. v. NLRB*, 456 F.2d 357 (2d Cir. 1972). In writing for the *Binch* court, Judge Friendly stated that although a permanent replacement need not actually appear on the job in order to displace a striking employee, the replacement must report within a reasonable period of time. *Id.* at 362. The district court here decided that two days constituted a reasonable time, that is, those trainees who did not complete their operating experience flights within two days of the Union's unconditional offer to return to work could not be considered permanent replacements.

TWA argues that the district court's "2-day rule" is totally without foundation in the law. It contends that trainees need not be fully qualified or actually working in order to be deemed a permanent replacement, relying on *Air Line Pilots Ass'n (ALPA) v. United Air Lines*, 614 F. Supp. 1020 (N.D. Ill. 1985), *aff'd in part & rev'd in part*, 802 F.2d 886 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 1605 (1987), and several cases arising under the National Labor Relations Act (NLRA). TWA thus asserts that all persons in training at the time of the Union's offer to return to work on May 17 were permanent replacements and not subject to displacement by returning strikers.

In our view, the Seventh Circuit's decision in *Air Line Pilots Ass'n (ALPA) v. United Air Lines*, *supra*, is dispositive of this issue. We observe that the district court did not have the benefit of the Seventh Circuit's *ALPA* opinion because it was

published after the district court's decision in this case. On appeal, however, the Seventh Circuit reversed the district court and rejected the rationale upon which TWA relies.

In *ALPA*, the airline hired some 500 pilots to work on the first day of the strike, but the employer required these pilots to undergo training before assuming flight duties.[6] The pilots refused to cross picket lines and United refused to consider them employees, thus making their employment contingent upon crossing the picket lines. The district court had determined that the trainees were entitled to employee status as of the first day of the strike in accordance with the offer by United and acceptance by the student pilots. 614 F. Supp. at 1042. Accordingly, the district court held that these trainee-pilots were protected by the RLA and the airline had unlawfully conditioned their employment on crossing a picket line. *Id.*

On appeal, the Seventh Circuit reversed the district court's determination that the pilot trainees qualified as employees. The Seventh Circuit ruled that an employee as defined by the RLA must be someone who has actually "*performed services for the employer under that employer's supervision.*" 802 F.2d at 913 (emphasis added). The court based its conclusion on the plain and specific language of the RLA, which provides RLA coverage to " 'every air pilot or other person *who performs any work as an employee* or subordinate official of such carrier or carriers, *subject to its or their continuing authority to supervise and direct the manner of rendition of his service.*' " *Id.* at 911 (quoting 45 U.S.C. § 181) (emphasis by the court). Accordingly, the trainees did not receive employee status and the protections of the RLA.

We follow the Seventh Circuit's ruling in *ALPA*.[7] The trainees in question, although hired by TWA, never performed

---

6 The pilot trainees in question were already trained pilots at the time of their "employment" with United. The training course familiarized them with United's planes and practices.

7 We note that the positions taken in *ALPA* differ from the present case, that is, the union in *ALPA* argues that the trainees were employees

any services for TWA under its supervision prior to the Union's offer to return to work. Thus, they cannot be considered employees within the meaning of the RLA.

We acknowledge that the circumstances surrounding the pilot trainees in *ALPA* differ from the situation here. Specifically, United expressly told the pilot trainees that they were not employees and they did not receive a salary pursuant to a signed agreement with United. In the present case, the opposite occurred: TWA told the trainees that they were employees and they received a salary.

These differences, however, are irrelevant under the RLA. The RLA does not extend its coverage based upon the employer's labelling of persons as employees or the payment of salary. Rather, RLA coverage is determined by the *work the person performs* under supervision of the employer. This performance factor is determinative in trainee situations because it is the only requirement that the statute explicitly includes. Thus, clear statutory language supports the conclusion that the trainess are not employees protected by the RLA because these trainees were not "performing any work" of the carrier by any stretch of the imagination.

This conclusion is further supported by the consequences resulting from the valid closed shop agreement that remains in effect between the parties in this case. The contract provides that union membership is a condition of continued employment with TWA. Thus, if the trainees were to be considered as employees, they would need to join the Union and pay dues. Furthermore, the training school would become a subject open to collective bargaining. None of these consequences occurred or have even been contemplated by the parties. In addition, our previous decision in *TWA* addressed the continuing obligation of Union members to pay dues. This court did not require trainees to pay dues.

---

whereas here, the Union argues that the trainees were not employees. The rule applies regardless of which party contends that trainees, not on the job, qualify as employees. The Seventh Circuit's holding is based on an interpretation of statutory language and binds all parties.

Additionally, the history of TWA's training program is instructive. Prior to the strike, trainees were not considered TWA employees by anyone. Only when the strike began did TWA attempt to accord the trainees employee status. TWA's attempt failed because these trainees did not perform services before the strike ended. To conclude otherwise would allow an employer to amass a trainee pool capable of replacing the entire striking workforce at some future date after the strike has ended. Such a result is inconsistent with the RLA's grant of protections to those persons who actually perform services for the employer.

Finally, cases decided under the NRLA also support the rationale that the trainees should not be considered employees. Under the NLRA, employees remain employed and are protected from discharge while they are on strike. 29 U.S.C. § 152(3). *Mackay Radio*, *supra*, recognized an exception to the statute's general rule by holding that an employer may hire replacements for strikers and need not fire the replacements once the strike has ended. 304 U.S. at 345-46. *Mackay Radio* is recognized as an exception to the general rule. *Giddings*, 675 F.2d at 926 (quoting *NLRB v. Mars Sales & Equipment Co.*, 626 F.2d 567, 572 (7th Cir. 1980)). Courts have been reluctant to extend the *Mackay Radio* exception. *See, e.g., Erie Resistor*, 373 U.S. at 232; *J. L. Clark*, 471 F.2d at 698.

Whether the trainees can be considered permanent replacements within the *Mackay Radio* exception depends upon the rationale used in *Mackay Radio*. In that case, the Court employed a balancing test that weighed the negative impact of hiring permanent replacements on union activity against the business justification for doing so.

Applying this balancing test to the trainees, the trainees do not obtain the status of permanent replacements. During the strike, TWA's interest in continuing its service required the replacement of strikers. The training of new people to fill strikers' positions was appropriate in fulfilling TWA's interest. People who completed their training during the strike and went to work clearly fit within the *Mackay* exception. They filled positions left open by strikers and permitted TWA to operate more efficiently. Thus the balance tips in favor of TWA.

The balance, however, is different for the trainees who had not completed their training when the strike ended. The strike ended when the Union unconditionally offered to return to work. Thus, TWA could operate with returning strikers. It established no business need to put trainees into working positions because all vacant positions could be filled with returning strikers. Thus, while TWA shows no business justification for employing 463 trainees ahead of regular employees who have ended the strike, TWA's utilization of trainees to prevent Union members from returning to their jobs causes great damage to the Union.

Accordingly, even applying the rationale of NLRA decisions, unreinstated strikers are entitled to those positions now held by the 463 trainees.

Although we do not adopt the district court's two-day rule, the status of the trainees remains the same under our reasoning as under the district court's two-day ruling. No trainee completed his or her training between the end of the strike, May 17, and May 20. The district court's two-day rule is more generous than what we have determined the RLA to allow but the Union has not objected to the district court's ruling. Thus, we conclude that any trainee who had not yet performed services for TWA under its supervision by May 17 is not a permanent replacement.[8]

III. Conclusion

For the reasons stated above, we affirm the district court's order granting employment preference to the new hires and denying such preference to the trainees. We reverse the district court as to the cross-overs. We remand this case and direct the district court to modify its judgment consistent with this opinion. TWA is directed to pay one-half the Union's costs in

---

8 After oral argument in this case, TWA filed a Rule 60(b)(3) motion seeking relief from the district court's decision concerning the trainees. TWA contends that the district court relied on facts that were misrepresented to the court.

The district court denied TWA's motion on February 17, 1987, and directed that the motion be forwarded to this court. Today's opinion moots the issue pressed by TWA and we express no further comment on its motion.

pursuing its cross-appeal as well as one-half of the Union's costs incurred in defending TWA's appeal.

A true copy.

Attest:

Clerk, U. S. Court Of Appeals,
Eighth Circuit.

JOINT

APPENDIX

No. 86-1650

Supreme Court, U.S.
FILED
MAR 12 1987
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

TRANS WORLD AIRLINES, INC.,
Petitioner,

vs.

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

MURRAY GARTNER*
PROSKAUER ROSE GOETZ & MENDELSOHN
300 Park Avenue
New York, New York 10022
Telephone: (212) 909-7000

PAUL E. DONNELLY
STINSON MAG & FIZZELL
920 Main Street
Kansas City, Missouri 64105

MARK A. BUCKSTEIN
MICHAEL A. KATZ
605 Third Avenue
New York, New York 10158

Counsel for Petitioner

STEVEN A. FEHR*
WILLIAM A. JOLLEY
JOLLEY, WALSH, HAGER & GORDON
204 West Linwood Blvd.
Kansas City, Missouri 64111
(816) 561-3755

Counsel for Respondent

*Counsel of Record

PETITION FOR CERTIORARI FILED APRIL 14, 1987
CERTIORARI GRANTED JUNE 8, 1987

TABLE OF CONTENTS

PAGE

Notation, in accordance with item 2(c) of the Clerk's Memorandum Re Printing, directing the Court to the place where certain opinions, orders and judgments below appear A1

Relevant docket entries in the United States District Court for the Western District of Missouri A2

Relevant docket entries in the United States Court of Appeals for the Eighth Circuit A4

Excerpts from Civil Cover Sheet, filed April 25, 1986, in the United States District Court for the Western District of Missouri A12

Notation, in accordance with item 2(c) of the Clerk's Memorandum Re Printing, directing the Court to the place where certain pleadings, filed in the United States District Court for the Western District of Missouri, appear A13

Notation, in accordance with item 2(c) of the Clerk's Memorandum Re Printing, directing the Court to the place where excerpts from the 1981-84 collective bargaining agreement between TWA and IFFA appear ... A14

Affidavit of Steven A. Fehr, filed in the United States District Court for the Western District of Missouri on July 12, 1986, with attachments A15

Affidavit of William A. Jolley, filed in the United States District Court for the Western District of Missouri on July 12, 1986, with attachments A28

Excerpts from the transcript of oral argument on summary judgment motion, on July 12, 1986, in the United States District Court for the Western District of Missouri A47

PAGE

Notation, in accordance with item 2(c) of the Clerk's Memorandum Re Printing, directing the Court to the place where stipulations, filed July 21, 1986, in Civil Action No. 86-6084-CV-SJ-6 in the United States District Court for the Western District of Missouri, appear A51

Affidavit of Paul E. Donnelly, filed August 19, 1986, in the United States Court of Appeals for the Eighth Circuit, with exhibits A52

Notation Pursuant to Item 2(c)
of the Clerk's Memorandum Re Printing

The following opinions, judgments and orders have been omitted in printing this joint appendix because they appear at the following pages in the appendices to the printed Petition for Certiorari:

Page

Memorandum and Order of the U.S. District Court for the Western District of Missouri, dated August 1, 1986 ..... 30a

Memorandum to Counsel and Order of the U.S. District Court for the Western District of Missouri Denying Request for Findings and Conclusions Regarding Stay, dated August 8, 1986 ..... 42a

Order of the U.S. Court of Appeals for the Eighth Circuit, dated August 14, 1986 ..... 19a

Order of the U.S. Court of Appeals for the Eighth Circuit, dated August 26, 1986 ..... 20a

Order of the U.S. Court of Appeals for the Eighth Circuit, dated September 25, 1986 ..... 22a

Order of the U.S. Court of Appeals for the Eighth Circuit, dated October 7, 1986 ..... 24a

Order of the U.S. Court of Appeals for the Eighth Circuit, dated October 15, 1986 ..... 26a

Order of the U.S. Court of Appeals for the Eighth Circuit, dated January 14, 1987 ..... 28a

Opinion and Judgment of the U.S. Court of Appeals for the Eighth Circuit, dated January 14, 1987 ..... 1a

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

DATE	NR	PROCEEDINGS
1986		
Apr. 25	01	COMPLAINT—For Declaratory Judgment, With Js-44c. $60.00 Plt. No summons issued.
		* * *
Jun 03	05	ANSWER—Def.'s Answer to Complaint for Declaratory Judgment and COUNTERCLAIM.
		* * *
Jun 24	08	ANSWER—Plt's Answer to Counterclaim for Declaratory Judgment.
Jun 25	09	MOTION—Plt's Motion for Summary Judgment on its Complaint and on Def's Counterclaim, with sugg.
Jul 03	10	CONSOLIDATE—Scheduling Order. HFS (86-6030-CV-SJ-6 86-6059-CV-SJ-6 and 86-6084-CV-SJ-6. PTC held July 1, 1986.
Jul 03 -	11	MOTION—Def's Motion for summary judgment on Def's Counterclaim, with sugg. in support.
Jul 12	12	MOTION—Def. The Independent Federation of Flight Attendants' Motion for Summary Judgment on Plt's Complaint, with Affidavit of William A. Jolley, Affidavit of Steven A. Fehr and Brief in support of Motion for Summary Judgment.
Jul 10	12	REPLY—Plt's reply sugg. in support of its motion for summary judgment.
Jul 12	13	MINUTES—Of Trial or Hearing. Oral Arguments on Summary Judgment Motion held in K.C., MO. before Hon. Howard F. Sachs on 07-12-86. Taken under advisement. John Bowen,Reporter. M. Shipley.
		* * *

DATE	NR	PROCEEDINGS
Jul 17	15	PLT.—TWA's Supplemental suggestions discussed during oral argument.
Aug. 01	16	MEMORANDUM AND ORDER—ORDERED that plaintiff's motion for summary judgment be DENIED and defendant's motion for summary judgment be GRANTED. Plaintiff shall implement the check-off provisions of Article 24 within fourteen (14) days of this date, and shall implement the union membership provisions within thirty (30) days of this date. If notice of appeal is filed, no stay pending appeal will issue from this court. The Court retains jurisdiction to modify or enforce this order. (HFS) Mailed.
Aug. 01	17	CLERK'S JUDGMENT—
Aug. 05		JS-6-Completed
Aug. 05	18	NOTICE OF APPEAL—by T.W.A. Copy of: Notice of Appeal & Docket sheet Order of Aug. 1, 1986 Clerk's Judgment fwd to appeals clerk.
Aug. 08	19	MOTION—Def. IFFA's motion to alter or amend judgment. w/sugg.
Aug. 08	20	MEMORANDUM—To Counsel and Order Denying Request For Findings and Conclusions Regarding Stay. HFS attorneys picked up copies from Mike in chamgers.
Aug. 12	21	NOTICE OF APPEAL—by T.W.A. copies mailed to 8th Circuit, HFS, Pat Brune, John Bowen, Court Reporter and all counsel, with transmittal letter.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

DATE	FILINGS-PROCEEDINGS
1986	
Aug 7	DOCKETED APPEAL
Aug 7	EMERGENCY motion of appellant for expedited appeal and for stay of judgment pending appeal
Aug 11	CERTIFIED copies notice of appeal, docket entries and order of 8/1/86 from District Court
Aug 12	RECEIVED copy of an order denying request for findings and conclusions regarding stay entered by the District Court on 8/8/86
Aug 12	IFFA's brief in opposition to TWA's emergency motion for expedited appeal and for stay of judgment pending appeal

• • •

Aug. 13	TWA's Reply Brief in Support of its Emergency Motion

• • •

Aug. 14	IFFA'S Supplemental Brief in Opposition to TWA'S Emergency Motion
Aug. 14	ORDER: The motion of appellant filed Aug. 7, 1986, for a stay of the memorandum and orders of the district court is granted. The stay hereby granted shall remain in effect until at least Aug. 26, 1986, and thereafter under further order of the court. The court orders parties to appear for oral arg. at St. Louis at one o'clock p.m. on August 26, 1986, to present arguments as to whether this stay should be continued during the appeal of the case on the merits. The case shall be expedited for hearing on the merits for the October 1986 session in St. Paul, Minnesota. The court sees no need for further briefs at this time unless the TWA flight attendants currently working for TWA wish to file a statement of their views on this case either as individuals or as a group, in which case short memorandums not to exceed five pages may be accepted by the Clerk of this court up to and including August 22, 1986.

DATE	FILINGS-PROCEEDINGS
Aug. 15	CERTIFIED copies notice of appeal, docket entries and orders 8/1/86 & 8/8/86 from District Court
Aug. 19	MOTION of Appellant to File Affidavit & Documents from Related Cases Between the Parties for the Court's Consideration at the Court's 8/26/86 Hearing.
Aug. 19	AFFIDAVIT of Paul E. Donnelly
Aug. 20	AFFIDAVIT of Counsel Attaching Certain Pertinent Portions of the District Court Record
Aug. 22	MEMORANDUM of Law Supporting Stay Pending Expedited Appeal Filed on Behalf of Some of TWA's Working Flight Attendants
Aug. 26	ARGUED AND SUBMITTED TO JUDGES ROSS, BRIGHT & WOLLMAN in St. Louis on *Motion for Stay*. Murray Gartner counsel for appellant. Steven A. Fehr counsel for appellee. Rebuttal by Gartner. Rebuttal by Fehr. RECORDED.
Aug. 26	ORDER: The supplemental affidavit of William M. Hoffman, dated August 20, 1986, will be accepted in camera and a copy will be provided to Mr. Gartner who will not reveal it to any other person except the immediate lawyers in his law firm who are working on this case.

DATE	FILINGS-PROCEEDINGS
Aug. 26	AFFIDAVIT of William M. Hoffman *In Camera*
Aug. 26	ORDER: The Court now modifies the stay as follows: TWA shall follow the order of Judge Sachs as set forth in order of August 1, 1986, with the following exceptions: All initiation fees and dues collected from persons now working as flight attendants for TWA who were not working as flight attendants for TWA on the date of the strike, March 7, 1986, shall be placed with a corporate trustee to be argeed upon by the parties, with interest, pending the final resolution of this case by this Court after hte case is heard on its merits at the October 1986 session of this Court in St. Paul. If the parties cannot agree on a corporate trustee, Judge Sachs shall appoint such trustee. Hearing shall be set for Wednesday, October 15, 1986 in St. Paul, Minnesota. Additional briefs not to exceed 25 pages from each litigant will be accepted. An amicus brief not to exceed 20 pages from the "new hires" among the current flight attendants will be permitted. *Appellant's brief due 9/15/86; Appellee's brief due 9/30/86; Reply brief 10/7/86. Amicus brief due 9/15/86. No extensions will be granted.* (UNPUB)
• • •	
Sept. 3	MOTION of Airline Industrial Relations Conference for Leave to File a Brief Amicus Curiae
Sept. 9	ORDER: Motion of Airline Industrial Relations Conference for leave to file brief amicus curiae is granted. The brief shall not exceed 20 pages and is due September 15, 1986.
• • •	

DATE	FILINGS-PROCEEDINGS
Sept. 15	BRIEF OF APPELLANT: w/ser 9/15 7 copies w/ *addendum*
Sept. 15	BRIEF AMICUS CURIAE: (Airline Industrial Relations Conf.) w/ser 9/15 7 copies
Sept. 15	BRIEF OF AMICUS CURIAE: (TWA's Working Flight Attendants) w/ser 9/15 14 copies
Sep. 17	ORDER: This case shall be heard on Wed, Oct. 15, 1986, in St. Paul, MN before a panel consisting of Chief Judge Lay, Judge Wollman and Senior Judge Bright. Judge Donald Ross has recused himself from furhter participation in this case.
• • •	
Sept. 22	MOTION of Glenda Lopez-Bruner, Louis Dantuano, Kerry Zesiger, June Shaw, Nancy King and Georgia Debever, etc. for Leave to Intervene and to Modify the Court's August 26, 1986 Order
Sept. 22	MEMORANDUM in Support of Motion to Intervene
Sept. 24	MOTION of Int'l Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) for Leave to File Brief Amicus Curiae
Sept. 25	ORDER: Appellee is directed to respond to the motion of Glenda Lopez-Bruner, et al. on or before September 29, 1986. Such response should be filed with the clerk with copies sent to Lay, Bright & Wollman. Pending ruling on the pending motion, TWA shall pay any moneys checked off from the cross-over employees to the same corporate trustee as selected under this court's order of August 26, 1986, to be held at interest and in escrow until the further order of this court. (UNPUB)

DATE	FILINGS-PROCEEDINGS
Sept. 29	ORDER: Appellant's reply brief shall be limited to twelve (12) pages.
Sept. 29	RESPONSE of IFFA in Opposition to Motion to Intervene and to Modify the Court's August 26, 1986 Order
Sept. 29	MOTION of Appellant for Leave to File Response in Support of Motion to Intervene
Sept. 29	Received Response of Appellant in Support of the Motion to Intervene *Filed 9/30/86—See Order 9/30/86.*
9/15/86	APPENDIX (1 copy)
Sept. 30	MOTION of International Brotherhood of Teamsters, Airline Division, for Leave to File Amicus Brief in Support of Appellee
Sept. 30	Received Brief of Amicus International Brotherhood of Teamsters, Airline Division—*FILED 10-7-86 per order of 10-7-86*
Sept. 30	Received United Automobile, Aerospace and Agricultural Implement Workers of America (UAW)'s Brief Amicus Curiae—*Filed 9/30/86—See Order 9/30/86.*
Sept. 30	ORDER: The arguments set for Wednesday, October 15, 1986, will convene at 8:30 a.m. The court will first consider the motion of Glenda Lopez-Bruner, et al. for leave to intervene and to modify the court's August 26, 1986, order. Ten (10) minutes per side is allocated for this issue. The movants may divide their time with TWA if they desire. The court will then hear argument on the merits of TWA's appeal. TWA and IFFA will each be given twenty (20) minutes to argue. The motion of UAW for leave to file an amicus brief is

DATE	FILINGS-PROCEEDINGS
	granted. The clerk is directed to file the amicus brief tendered on September 30, 1986, by the UAW. The motion of TWA for leave to file a response in support of the motion for leave to intervene is granted.
Oct. 2	BRIEF OF APPELLEE: w/ ser 9/30 7 copies *w/ addendum*
Oct. 2	Received Applicants to Intervene's Reply to Appellee's Response to Motion to Intervene
Oct. 2	EMERGENCY Request for Clarification of the Court's August 26, 1986, Order as Amended Herein
Oct. 3	MOTION of Appellant for Leave to File Response to Emergency Request for Clarification by Applicants to Intervene
Oct. 3	ORDER: Appellant's motion for leave to file response to emergency request for clarification by applicants to intervene
Oct. 3	RESPONSE of Appellant to Intervenors' Emergency Request for Clarification of the Court's August 26, 1986 Order as Amended
Oct. 6	OPPOSITION of IFFA to Intervenors' Emergency Request for Clarification and to TWA's Response to the Emergency Request
Oct. 7	ORDER: The motion of the International Brotherhood of Teamsters, Airline Division, for leave to file an amicus brief is granted.
Oct. 7	REPLY BRIEF OF APPELLANT: w/ser 10/7 7 copies
Oct. 7	ORDER: The court directs that any cross-over employee who claims to have resigned from teh union, instead of paying dues to the union,

DATE	FILINGS-PROCEEDINGS
	may pay current or delinquent dues to the corporate trustee serving under this Court's order of Aug. 26, 1986, to be held at interest and in escrow by said trestee, subject to the further order and direction of this Court. Such payment shall be deemed payment of union dues by said employee pursuant to the preexisting collective bargaining agreement between TWA and IFFA. This order remains in force until the hearing on said motions at 8:30 a.m., Wednesday, October 15, 1986, in St. Paul and, unless specifically extended, will expire at 5:00 p.m. that date. The emergency partial stays embodied in this Court's order of Sept. 25, 1986, will also expire at 5:00 p.m. October 15, 1986, unless specifically extended by the Court.
Oct 8	RECEIVED 28(j) from appellee's counsel (to court)
	• • •
Oct 15	ARGUED AND SUBMITTED IN ST. PAUL before Judges Lay, Bright, Wollman. Motion to intervene: H. Kent Munson for intervenor, Steven Fehr for appellee and Murray Gartner for appellant. Merits: Murray Gartner for appellant, Steven Fehr for appellee. Rebuttal by Mr. Gartner. Recorded.
Oct 15	ORDER: Modification or clarification of partial stay order of Aug. 26 is denied; partial stay order of August 26 is dissolved. Corporate trustee is directed to pay IFFA (Union) funds now held in escrow. All union dues and agency fees of flight attendants of TWA shall be paid directly to the union until further order of this court.

DATE	FILINGS-PROCEEDINGS
Oct 14	RECEIVED response from appellant's counsel to 28(j) of appellee's dated 10/7 (air exp to St. Paul)
Oct 15	RECEIVED 28(j) from counsel for appellant. To court.
1987	
Jan 14	ORDER: Motion for Leave to intervene for limited purpose is granted. Those persons are not recognized as intervenors on the merits of the appeal. (Unpublishedl)
Jan 14	OPINION BY BRIGHT, PUBLISHED
Jan 14	JUDGEMENT: Judgment of the district court is affirmed in accordance with the opinion of this Court.
Feb. 19	MANDATE ISSUED. rmh
	• • •
Mar. 2	RECEIPT FOR MANDATE.
Apr. 23	NOTICE OF FILING of pet.for writ of cert. to the Sup.Ct. of the U.S. as case no. 86-1650 dated 4-14-87
June 16	CERTIFIED COPY OF ORDER of the Sup.Ct. of the U.S. *granting* certiorari in case no. 86-1650 dated 6-8-87

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

CIVIL COVER SHEET

• • •

I (a) PLAINTIFFS

TRANS WORLD AIRLINES, INC.
Kansas City International Airport
Kansas City, Missouri

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF *New York*
(EXCEPT IN U.S. PLAINTIFF CASES)

DEFENDANTS

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS, an Unincorporated Labor Organization
630 Third Avenue
New York, New York 10017
COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT *New York*
(IN U.S. PLAINTIFF CASES ONLY)

• • • • •

VIII RELATED CASE(S) (See instruction):

IF ANY Yes (see attached)
JUDGE *H.F. Sachs* DOCKET NUMBER *86-6030-CV-SJ-6*

DATE: April 25, 1986

SIGNATURE OF ATTORNEY OF RECORD: Paul E. Donnelly

UNITED STATES DISTRICT COURT

This case is related to *Independent Federation of Flight Attendants vs. Trans World Airlines, Inc.*, Civil Action No. 86-6030-CV-SJ-6 and would have been filed as a counterclaim in that action except for the fact that the pleadings are not in a position where TWA may file its answer (including a counterclaim) at this time.

Notation Pursuant to Item 2 (c) of the Clerk's Memorandum Re Printing

The following pleadings, filed in the U.S. District Court for the Western District of Missouri, have been omitted in printing this joint appendix because they appear at the following pages in the appendices to the printed Petition for Certiorari:

Complaint for Declaratory Judgment, filed April 25, 1986 ..... 82a

Defendant's Answer to Complaint for Declaratory Judgment and Counterclaim, filed June 3, 1986 .... 102a

Plaintiff's Answer to Counterclaim for Declaratory Judgment, filed June 24, 1986 ..... 109a

**Notation Pursuant to Item 2(c)
of the Clerk's Memorandum Re Printing**

The following excerpts from the 1981-84 collective bargaining agreement between TWA and IFFA have been omitted in printing this joint appendix because they appear at the following pages in the appendices to the printed Petition for Certiorari:

Preamble and Article 1: Recognition 55a

Article 4: Expenses 56a

Article 17: System Boards of Adjustment 56a

Article 22: Insurance Benefits 66a

Article 24: Union Security 66a

Article 27: Reopeners 76a

Article 28: Duration of Agreement 78a

Letter No. 1 ..... 80a

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

Civil Action No. 86-6059-CV-SJ-6

TRANS WORLD AIRLINES

Plaintiff,

vs.

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Defendant.

AFFIDAVIT OF STEVEN A. FEHR

STATE OF MISSOURI,
COUNTY OF JACKSON, ss.:

Comes now Steven A. Fehr, having first been sworn, and states as follows:

1. I am one of the attorneys for the Defendant in this case.

2. Pursuant to my research in this case, I have obtained copies of the briefs filed before the United States Supreme Court in *BRAC v. REC Railway*, 384 U.S. 238 (1966).

3. The brief of BRAC and the other petitioner unions on page 8 states that and there were eleven unions involved in the strike and subsequent litigation involved in FEC Railway. A copy of page 8 is provided at attachment 1 to this brief.

4. The brief of BRAC before the Supreme Court also states the following at p. 6-7, n. 2:

> The only significant documents which do not appear in the Exhibit Volume are the many voluminous contracts

between the FEC and the non-operating unions (Pl.'s Exh. 4, R. 285), which were already in printed form and were not, by agreement of all parties, reprinted for the Court of Appeals, but, instead, several printed copies of one of the contracts, the Shop Crafts Agreement (Pl. Exh. 4-C, R. 333-334), were supplied to the Court of Appeals as a part of the record. Fourteen copies of this printed Shop Crafts Agreement, plus fourteen copies of three other contracts, have also been supplied to the Clerk of this Court.

The pages referred to are produced in their entirety as attachment 2 to this Affidavit.

4. From my reading of the briefs, I have found only one mention to any of the duration clauses in any of the contracts. That one reference appears in the brief of the United States (p. 24, n. 17).

5. The brief of FEC Railway before the Supreme Court cites the case of *FEI v. Eastern Air Lines*, 243 F.Supp. 701 (S.D. N.Y. 1965).

6. The FEC Railway also filed a Supplementary Reply Brief for the Supreme Court, sole purpose of which was to attach the Second Circuit Opinion in the FEIA litigation which was decided on April 12, 1966. See attachment 4 to this Affidavit.

7. I have obtained a copy of the collective bargaining agreement between BRAC and the FEC Railway effective July 1, 1962. I received this copy from BRAC national headquarters in Rockville, Maryland. Attachment 4 to this Affidavit is a copy of the cover and the pages containing the duration clause language of said agreement.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ STEVEN A. FEHR
Steven A. Fehr

Subscribed and sworn to before me this 2nd day of July, 1986.

/s/ NANCY CRIST
Notary Public

My Commission expires May 6, 1987.

JOLLEY, WALSH, HAGER & GORDON
1125 Grand Avenue, Suite 1300
Kansas City, Missouri 64106
Tel: 474-1240

By /s/ STEVEN A. FEHR
Steven A. Fehr

ATTORNEYS FOR DEFENDANT

[Certificate of Service omitted]

[MAR 21 1966
JOHN F. DAVIS, CLERK]

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1965

No. 750

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, AFL-CIO, ET AL., *Petitioners*,

v.

FLORIDA EAST COAST RAILWAY COMPANY

No. 782

UNITED STATES, *Petitioner*,

v.

FLORIDA EAST COAST RAILWAY COMPANY, ET AL.

No. 783

FLORIDA EAST COAST RAILWAY COMPANY, *Petitioner*,

v.

UNITED STATES

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONERS IN NO. 750

LESTER P. SCHOENE
Schoene and Kramer
1625 K Street Northwest
Washington, D.C. 20006

NEAL RUTLEDGE
ALLAN MILLEDGE
RICHARD L. HORN
Rutledge and Milledge
601 Flagler Federal Building
111 Northeast First Street
Miami, Florida 33132
Counsel for Petitioners

the NMB had finally acted upon them under Section 5, First, of the Railway Labor Act, and that the "Conditions of Employment" had been implemented without following any of the procedures required by the Railway Labor Act. The complaint was accompanied by a motion for preliminary injunction (R. 13-16), and an affidavit of the Executive Secretary of the NMB (R. 37-42).

On May 6, 1964, eleven of the eighteen labor organizations referred to in the complaint moved to intervene as additional plaintiffs (R. 43-44). The movants were the eleven so-called "non-operating"[4] unions which had gone on strike against the FEC on January 23, 1963, and are the petitioners in Case No. 750 in this Court.

On May 26, 1964, the FEC filed its answer to the complaint (R. 96-107) admitting many of the factual allegations of the Government's complaint. The case came on for hearing (R. 235) before Chief Judge Bryan Simpson on the Government's motion for a preliminary injunction, the eleven non-operating unions' petition to intervene, and various FEC defensive motions [e.g., motion to dismiss, (R. 108); motion to stay, (R. 50); motion to continue, (R. 56)]. The petition to intervene was granted at the outset after argument (R. 243); the motions to stay and to continue were denied (R. 244-249); and the motion to dismiss was carried with the case (R. 267-269).

4 In the parlance of the railroad industry, "operating" unions are unions representing crafts which actually operate trains (e.g., engineers, conductors, trainmen, brakemen, firemen, switchmen, hostlers, and yardmen) while "non-operating" unions represent other crafts involved in the railroad business (e.g., clerks, maintenance-of-way employees, signalmen, telegraphers, machinists, etc.). Since dissolution of Eugene V. Debs' American Railway Union after the Pullman strike of 1894, the railroad industry has been overwhelmingly organized along "craft" rather than "industrial" lines. The exceptions to this pattern usually involve only small railroads owned and operated by industries, such as the steel industry, which are organized on an industrial basis. The FEC's Section 6 Notice of September 24, 1963, and its "Conditions of Employment" virtually abolish all craft lines.

For three days (May 26-May 28, 1964) the District Court received testimony and evidence on the motion for a preliminary injunction (R. 275-592). At the conclusion of the hearing the Court announced it would delay ruling for a reasonably short time to see if the Court of Appeals might render its decision soon in a pending companion case (*Florida East Coast Ry. Co.* v. *Brotherhood of Railway Trainmen*, 336 F.2d 172, cert. den., 379 U.S. 990)[5] involving many of the same issues (R. 588-589).

The Court of Appeals ruled in the *Trainmen's* case on August 18, 1964.[6] Thereafter, upon receiving supplemental memoranda from the parties (R. 141, 151), the District Court on October 30, 1964, rendered its Findings of Fact and Conclusions of Law (R. 180-189) and its Preliminary Injunction (R. 189-191) in this case. The relief granted was substantially as sought in the complaint except that the FEC, pursuant to the *Trainmen's* decision, was granted permission to apply to the Court for specific authorization to make changes in rules, rates of pay, and working

5 Hereinafter referred to as the *Trainmen's* case.

6 The Opinion in the Trainmen's case is reproduced in Appendix C to the Government's petition for certiorari in No. 782, pp. 26a-44a.

[MAR 21 1966
JOHN F. DAVIS, CLERK]

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1965

No. 750

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, AFL-CIO, ET AL., *Petitioners*,

v.

FLORIDA EAST COAST RAILWAY COMPANY

No. 782

UNITED STATES, *Petitioner*,

v.

FLORIDA EAST COAST RAILWAY COMPANY, ET AL.,

No. 783

FLORIDA EAST COAST RAILWAY COMPANY, *Petitioner*,

v.

UNITED STATES

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONERS IN NO. 750

LESTER P. SCHOENE
Schoene and Kramer
1625 K Street Northwest
Washington, D.C. 20006

NEAL RUTLEDGE
ALLAN MILLEDGE
RICHARD L. HORN
Rutledge and Milledge
601 Flagler Federal Building
111 Northeast First Street
Miami, Florida 33132
Counsel for Petitioners

has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

QUESTIONS PRESENTED

1. May a Federal District Court aid a carrier faced with a legal strike, by relieving the carrier from its duty to comply fully with the Railway Labor Act in order to effectuate the carrier's "right to continue to run its railroad under the strike conditions"?

2. Did not the Court of Appeals rule in conflict with a decision of this Court, *Brotherhood of Railroad Trainmen* v. *Toledo, P. & W. R.R.* (1944), 321 U.S. 50, by holding that affirmative federal equitable relief may be granted to a railroad involved in a legal strike even though the railroad has repeatedly rejected voluntary arbitration of the strike issues?

STATEMENT OF THE CASE

Present Litigation

The United States brought this suit in April, 1964, in the United States District Court for the Middle District of Florida, Jacksonville Division, against the Florida East Coast Railway Company[1] to enforce the "status quo" provisions of Section 2, Seventh, and Section 6 of the Railway Labor Act (R. 2-11).[2]

---

1 Hereinafter referred to as FEC.

2 The printed record in this case consists of three volumes. Volumes I and II contain the pleadings, court orders, and a transcript of the testimony. The third volume, entitled "Exhibit Volume", contains most of the documentary evidence introduced at the hearings, certain excluded exhibits designated for inclusion by the FEC, and the exhibits attached to the Affidavit of Eugene C. Thompson, Executive Secretary of the National Mediation Board, which the trial Court stated without objection would be considered by the Court and, to avoid duplication in the record should not be reintroduced into evidence (R. 278). Volumes I and II are paginated consecutively whereas the Exhibit Volume is paginated independently. References to Volumes I and II will be made by the symbol "R.", e.g., "R. 25"; references to the Exhibit Volume will be made as follows: "Exh. Vol., p. 25." The only significant documents which do not appear in the Exhibit Volume are the many voluminous contracts between the FEC and the non-operating unions (Pl.'s Exh. 4, R. 285), which were already in printed form and were not, by agreement of all parties, reprinted for the Court of Appeals, but, instead, several printed copies of one of the contracts, the Shop Crafts Agreement (Pl. Exh. 4-C, R. 333-334), were supplied to the Court of Appeals as a part of the record. Fourteen copies of this printed Shop Crafts Agreement, plus fourteen copies of three other contracts, have also been supplied to the Clerk of this Court.

The three-count complaint sought injunctive relief to prohibit the FEC from continuing in effect or implementing (1) a Section 6 Notice of July 31, 1963 (i.e., a notice required under § 6 of the Railway Labor Act), served by the FEC upon eighteen labor organizations proposing to abolish the union shop provisions in its contracts with those organizations; (2) a Section 6 Notice of September 24, 1963, served by the FEC upon seventeen labor organizations proposing a complete revision of all existing rules, rates of pay, and working conditions; and (3) certain "Conditions of Employment" which were also a complete revision of all contracts substantially the same as the September 24, 1963, Section 6 Notice proposal, and which the FEC had promulgated in written form on September 1, 1963, and had put into effect and implemented without serving any Section 6 Notice whatsoever.

The complaint alleged that the two Section 6 Notices had been put into effect while the National Mediation Board[3] had then docketed for mediation and before

---

3 Hereinafter referred to as NMB.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1965

No. 750

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, AFL-CIO, ET AL., *Petitioners*,

v.

FLORIDA EAST COAST RAILWAY COMPANY

No. 782

UNITED STATES OF AMERICA, *Petitioner*,

v.

FLORIDA EAST COAST RAILWAY COMPANY

No. 783

FLORIDA EAST COAST RAILWAY COMPANY, *Cross-Petitioner*

v.

UNITED STATES OF AMERICA -

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

SUPPLEMENTARY REPLY BRIEF OF FLORIDA EAST COAST RAILWAY COMPANY

In the Initial Brief of Florida East Coast Railway Company (No. 783), pp. 18, 29, reference was had to *Flight Engineers* v. *Eastern Air Lines*, 243 F. Supp. 701 (S.D.N.Y. 1965) and to the fact that an appeal was pending in the case. This case was decided on April 12, 1966 and the Opinion of the United States Court of Appeals for the Second Circuit follows:

AGREEMENT

Between the

FLORIDA EAST COAST RAILWAY COMPANY

and

CLERICAL AND STATION EMPLOYES

Represented by

THE BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

GOVERNING HOURS OF SERVICE AND WORKING CONDITIONS.

Effective July 1, 1962

shall not be discontinued or abolished and new ones created, covering relatively the same class of work, which will have the effect of reducing rates of pay or evading the application of these rules.

RULE 74

DEADHEADING:

Furloughed employes who have been permitted to waive their rights to vacancies of less than thirty days' duration will be paid for actual time consumed in traveling to and from performing service at pro rata rate of position filled when such waivers are canceled by the Railway. This allowance will be paid only for the first vacancy called to protect after cancellation of the waiver on the first trip to the vacancy and the last trip when relieved from the vacancy.

RULE 75

PUBLISHING OF SCHEDULES

This schedule of working conditions shall be published by the Railway and any employe covered by this Agreement affected thereby shall be provided with one copy on request.

RULE 76

DATE EFFECTIVE AND CHANGES

(a) This agreement shall be effective July 1, 1962, superseding all other rules, agreements, and understandings in conflict herewith and shall continue in effect until changed as provided herein or in accordance with the Railway Labor Act, as amended.

(b) Should either of the parties to this agreement desire to revise or modify these rules, thirty (30) days' written advance notice containing the proposed changes shall be given and conference shall be held immediately on the expiration of such notice unless another date is mutually agreed upon.

Signed at St. Augustine, Florida, this 18th day of May, 1962.

FOR THE ORGANIZATION:

The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes

By: W. F. Howard
General Chairman.

By: Frances K. DuBose
Vice General Chairman.

Approved:
J. D. Bearden
Vice Grand President.

FOR THE CARRIER:

Florida East Coast Railway Company
By: R. W. Wycoff
Assistant Vice President and Director of Personnel.

WITNESSED:

By: Warren S. Lane
Mediator, National Mediation Board.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

Civil Action No. 86-6059-CV-SJ-6

TRANS WORLD AIRLINES

Plaintiff,

vs.

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Defendant.

AFFIDAVIT OF WILLIAM A. JOLLEY

STATE OF MISSOURI,
COUNTY OF JACKSON, ss.:

Comes now William A. Jolley, having first been sworn, and states as follows:

1. I have been chief legal counsel of the Independent Federation of Flight Attendants since its inception and certification by the National Mediation Board on April 1, 1977.

2. Attached to this affidavit are what I believe to be true and accurate copies of (1) TWA's Section 6 Notice sent to IFFA on or about February 29, 1984; (2) the opening proposals which were attached to TWA's Section 6 Notice; and (3) a copy of a bulletin sent to flight attendants on March 7, 1986 from TWA Vice-President of In-flight Services William Borden regarding changes in flight attendant rates of pay, rules, and working conditions to be implemented.

3. Since April 1, 1977 and continuing to date I have had numerous discussions with various TWA officials and representatives concerning interpretation of terms of the collective

bargaining agreement, grievance handling, arbitrations and in the course of numerous collective bargaining negotiations sessions. At no time prior to receipt of an April 25, 1986 letter signed by J.W. Hoar have I ever heard any such official or representative of TWA refer to an "expiration" date of the collective bargaining agreement or speak in terms of that agreement "expiring" or "terminating" or in any other way suggesting or implying that on or after March 7, 1986, TWA could or have the right to unilaterally implement or change terms of conditions of employment other than those which had been subject to Secton 6 Notices and made the subject of collective bargaining. On the contrary, since April 1, 1977 and until April 25, 1986, TWA officials and representatives referred to the "amendable" date of the Agreement and spoke in terms of that Agreement "becoming amendable."

FURTHER AFFIANT SAYETH NAUGHT.

/s/ WILLIAM A. JOLLEY
William A. Jolley

Subscribed and sworn to before me this 2nd day of July, 1986.

/s/ NANCY CRIST
Notary Public

My Commission expires May 6, 1987.

JOLLEY, WALSH, HAGER & GORDON
1125 Grand Avenue, Suite 1300
Kansas City, Missouri 64106
Tel: 474-1240

By /s/ STEVEN A. FEHR
Steven A. Fehr

ATTORNEYS FOR DEFENDANT

[Certificate of Service omitted]

[Letterhead of TWA]

February 29, 1984

Mr. Arthur Teolis
President
Independent Federation of
Flight Attendants
630 Third Avenue
New York, New York 10017

Dear Mr. Teolis:

Pursuant to the provisions of Section 6, Title I of the Railway Labor Act, as amended, and Article 28 of the Agreement between TWA and the Flight Attendants as represented by the Independent Federation of Flight Attendants, signed April 12, 1983, notice is hereby given to the Independent Federation of Flight Attendants as the current representatives of the Company's Flight Attendants that TWA intends to make certain changes in the Agreement.

Copies of the Company's proposals are attached hereto.

In accordance with the requirements of the Act, the Company negotiating committee shall be available to meet with your representatives on Tuesday, March 6, 1984 at 10:00 a.m. in Conference Room 38A at TWA's offices, 605 Third Avenue, New York. Please contact my office in order to confirm final arrangements for this meeting.

Very truly yours,

/s/ J. W. HOAR

J. W. Hoar
Director/Technical
& Contract Liaison

Attachments
JWH:kec

COMPANY FLIGHT ATTENDANT OPENERS
FEBRUARY 29, 1984

Company #1 Compensation

In that the cost reductions requested in Phase I concession discussions were not forthcoming, the Company proposes to amend Article 3 and related provisions of the agreement by reducing rates of pay in effect as of April 1, 1984 by 13% and by rescinding the wage increase scheduled for July 2, 1984.

Since TWA no longer operates the 707 nor requires the dinner jacket as a part of the uniform, the Company proposes to delete Letter of Agreement V and Article 4(B)(1)(e) so as to eliminate the differential compensation and the jacket cleaning allowance.

Company #2 Expenses

Amend Article 4 to reduce the current hourly trip and training expense to an industry standard of $1.50 per hour.

Amend Article 4 to permit the Company to select layover hotels in all instances in order to achieve quality and maximum cost advantage through large group rates.

Amend Article 4 to allow combined domestic ground transportation for all crew members in order to achieve immediate cost reduction.

Delete Article 4(C)(4) to eliminate the crew meal penalty payment.

Company #3 Satellites

Add a Letter of Agreement to provide for the establishment of satellite operations at domestic and international cities (e.g. MIA, FCO, CDG, PHX and LAS etc.). Scheduling rules and limitations as contained in Articles 6, 18 and other related provisions shall be based on the satellite city. Satellite lines of time may be assigned to any domicile city for bidding. Reserve staffing shall be maintained at the domicile and shall not be required at a satellite city. Flight Attendants may bid these cities on a monthly basis.

Company #4 Flexible Monthly Credit Cap

Amend Articles 6-A, 6-B, 8-A, 18-B, Letter of Agreement IX and other related provisions to allow for an adjustable monthly credit CAP which promotes stability by reducing exposure to displacement caused by seasonal and major schedule changes, provides for growth potential, and allows a more economical operation through increased flying during peak months, while providing job security during low flying months. The Company may raise or lower the CAP within a range of 65 to 85 hours by status, satellite or domicile. The payment of bow wave credit shall be at Company option. Once overprojected a Flight Attendant shall have the option to increase his/her projection subject to Company approval. Eliminate the Simons arbitration decision regarding the Scheduling Policy. Base pay shall be no less than ten hours below CAP. The reserve guarantee shall be no less than five hours below CAP. Amend Article 2(G) to provide for April

thru September to be considered as normal calendar months for scheduling/pay purposes.

Company #5 Scheduling of Flight Attendants

Amend Articles 18-A, 18-B and other related provisions to permit the Company to balance Flight Attendants on other than their guaranteed days off.

Amend Articles 6-A, 6-B and other related provisions to eliminate last trip guarantee, inversal and move-up protection.

Company #6 Bidding Procedures

Amend Articles 18-A, 18-B and other related provisions to provide for Flight Attendant preferences for international or domestic lines of time which will be awarded in seniority order on a monthly basis. This will allow the Flight Attendant the opportunity to change operations on a monthly basis. The Company shall publish one bid package at each combined location for Flight Attendant bidding. Delete Letter of Agreement IX to provide for a one month CAP limitation for all flying and eliminate the restrictions of the Sembower award in order to permit more economical sequencing. Flight Attendants who are subject to balance may be balanced on either operation subject to individual preference and open flights. Amend Article 6-B(T) as provided for in Company opener #9 below. The Company may establish one reserve complement to protect both operations. Sequencing provisions for both operations will be in accordance with the flexible monthly credit CAP.

Company #7 Trip and Duty Formulas

Amend Articles 6-A, 6-B and other related provisions to provide for a modification of the current trip rig from 1 for 3.5 to 1 for 4, and the current duty credit minimum per on duty period from 4:30 to 4:00.

Company #8 On Duty Limits

Amend Article 6-B to modify the international report and release times to provide for a one hour report and a :30 minute release.

Amend Article 6-A(S) to increase the scheduled domestic on duty limitations to thirteen hours.

Amend Article 6-A and 6-B to allow the Company to average the duty credit in multiple duty period pairings.

Company #9 Minimum Rest

Modify Article 6-B(T) regarding international minimum rest to allow for increased back to back flying at domicile and for a more economical operation at layover as outlined below:

At domicile

two hours rest for each hour flown on the last leg into domicile with a minimum of 11 and a maximum of 16 hours.

At Layover

13:30 scheduled block to block
11:30 actual block to block.

Delete Articles 6-A(R) and (T) (i.e. 8 in 24), to permit more efficient pairings and back to back flying. Amend Article 6-A(S) to provide for a minimum rest of 8:45 block to block.

Company #10 Vacations

Amend Article 9 to reduce the vacation day accrual by 20%. Amend Article 6-A, 6-B and other related provisions in order to eliminate the trips missed for vacation.

Delete Article 9(K).

Company #11 Reserve

Amend Articles 6-A, 6-B, 18-A, 18-B and other related provisions in order to provide for the following:

Reduce the number of reserve days off to ten per bid month.

Reserves to call in twice a day for assignment. Normal notice for assignments shall be four hours.

Reserve days off to be awarded after relief runs have been constructed but in no event later than the last day of the previous month.

Company #12 Crew Complement

Amend Article 26 to provide for a reduction in the penalty payment on each aircraft, and further that staffing shall not be less than the FAA Regulations. Additional staffing shall be in accordance with service and passenger load and at Company discretion.

Amend Articles 2, 26 and other related provisions in order to eliminate the Purser position.

Amend Articles 2, 26 and other related provisions to provide that there shall be no further promotions to the FSM position and that no FSM reserves shall be staffed for that position at any location. In the event that the proce-

dures of the Railway Labor Act have been exhausted without agreement and execution of a successor labor agreement, the FSM position shall be eliminated.

Company #13 New Hire and Recalled Furloughee Wages and Benefits

Amend Articles 3, 8A and B, 9, 21, 22 and other related provisions to provide for a New Hire Flight Attendant Wage Scale and Benefits. In an effort to increase the feasibility of Flight Attendant recalls the Company proposes to amend Article 3 and other related provisions to provide for a reduced recalled furloughee wage scale.

In order to expedite the implementation of these provisions, the Company shall consider the possibility of offering special severance incentives, including cash buy-outs and/or travel privileges.

Company #14 Management Seniority and XCAP use

Amend Article 10 so that Flight Attendants who have accepted promotions to management positions shall have their seniority restored and continue to accrue seniority in the classification from which promoted.

Amend Article 7 to allow for management use of the jump seats on board the aircraft.

Company #15 Articles 16 and 24

Delete Article 16(A)(3)(a) and 16(B).

Amend Article 24 so that in the event of a job action, work stoppage or strike, the dues check-off procedure shall not be administered by the Company.

Company #16 Insurance

Amend Article 22 so as to provide for the implementation of a restructured Medical/Dental Insurance Plan, with employees contributing a percentage of the cost of such plans.

Amend Article 22 so as to provide that, effective 1/1/85 employees who retire on or after 1/1/85 and who are eligible for group insurance shall be permitted to purchase such insurance coverage by contributing a percentage of the cost of such plans.

Company #17 Retirement

Amend Article 21 so as to provide that an employee who early retires after 1/1/85 will have his benefit reduced by 5% per year for each year preceding his 60th birthday.

Amend Article 21 so as to provide that, effective 1/1/85, the Lump Sum distribution shall be computed on the basis of 1.5% over the prevailing interest rate of the PBGC.

Company #18 Duration

Amend Article 28 so as to provide for a three year agreement.

Company #19 General

Amend Article 20(I) by adding a paragraph (8) prohibiting IFFA and/or its members from authorizing, encouraging or participating in any work stoppage, strike or job action of any kind during the term of the agreement.

Company #20 Reopener

Amend Aricle 27 to enable the Company to reopen the agreement in the event that any carrier operates in competition with TWA with significantly lower Flight Attendant costs, or obtains reduced Flight Attendant costs.

The Company reserves the right to propose further additions, deletions, modifications or other changes in the agreement warranted by conditions that may arise prior to the execution of a basic collective bargaining agreement, succeeding the current agreement.

NEW HIRE "B" SALARY RATES AND BENEFITS *FOR FLIGHT ATTENDANTS HIRED ON OR AFTER 8-1-84*

I. COMPENSATION

	TWA PROPOSED NEW HIRE FLIGHT ATTENDANT "B" HOURLY WAGE RATE
1st yr.	14.50
2nd yr.	15.25
3rd yr.	16.00
4th yr.	16.75
5th yr.	17.50
6th yr.	18.25
7th yr.	19.00
	TOP RATE

— The same pay rate will be paid on both Domestic and International operations.

— Incentive pay rates are eliminated.

— Hourly compensation will be paid for all hours worked.

— "B" Rates will remain in effect for the duration of this agreement and for the successor agreement.

— All Rated Pay items are eliminated.

II. VACATION

— 1 through 5 years	— 10 days
— 6 through 15 years	— 15 days
— 16 through 25 years	— 20 days
— 26+ years	— 25 days

III. SICK LEAVE/OCCUPATIONAL INJURY LEAVE

— No sick leave/occupational injury leave pay for the first six months of employment.

— Thereafter, no sick leave or occupational injury leave pay will be paid for first day of absence, per occurrence.

— Sick leave accrual—3 hours/month, with maximun of 350 hours.

IV. RETIREMENT

— New Hire flight attendants will not participate in the Retirement Plan for Flight Attendants of TWA (i.e., A Plan). Instead, they will participate in a modified retirement plan requiring reduced Company contributions.

V. INSURANCE

— New Hire flight attendants will participate in a restructured Medical/Dental Insurance Plan, with employees contributing 30% of the cost of such Plans.

IN FLIGHT SERVICES BULLETIN

To: All Flight Attendants
Cpy: In-Flight Services Management

From: Vice President—In Flight Services

Date: March 7, 1986

Re: F/A Work Rules

TWA and IFFA failed to reach an Agreement by 0001/07 March, 1986. Therefore, the following changes will be effective immediately and implemented as soon as possible, on a phased-in basis.

New

- All elements of pay reduced by 22% for F/A's on the seniority list as of 11-1-85.
- Hourly expenses of $1.50 per hour.
- Downtown hotels will be provided for domestic layovers of 24 hours or more.
- One reserve pool for both domestic and international C/A's and one reserve pool for both domestic and international FSM's, all paid at international rates of pay.
- Ten-day reserve spread for both domestic and international reserves.
- All reserves will have two call-in periods daily (1000-1300/2200-0100). Standby assignments will start 2 hours from notification; flight assignments will start 4 hours from notification.
- F/A's at combined domiciles (JFK-BOS-STL-ORD-LAX) will have one bid package for domestic and international allowing bidding to international or domestic each month w/o transferring.

- Trades and balances may be on either operation.
- "Satellite" city lines of time may be posted for bid at any domicile.
- Trip Rig is 1 for 4.
- Minimum duty credit is 4 hours and will be averaged.
- Scheduled domestic on-duty time increased from 12½ to 13 hours.
- International report time will be one hour and release time will be 30 minutes at domicile and layover.
- Flex cap—flexible monthly limitations of 70-85 credit hours will be instituted. The CAP (maximum credit limitation) for the month of March for all categories at all locations will be 85 credit hours.
- Parental Time Off—adoption leaves of absence up to three months; paternity PTO up to 30 days; maternity leaves extended up to six months from date of delivery.
- Vacations not yet taken in 1986 and future accruals are reduced by 20%:

  4 yrs. or less = max of 12 days
  5-7 yrs. = max of 18 days
  8-24 yrs. = max of 24 days
  25 yrs. or more = max of 36 days

- Ticket Lift—F/A's will assist ground personnel in the boarding process, including the lifting of flight coupons in the gate area.
- Crew rest seats will be in Ambassador Class for those international flights which require blocked and curtained rest seats.
- F/A's hired after 11/1/85 will have a 12-month probationary period and will be paid $1007.50 per month minimum on revised longevity wage scale.

- A restructured Medical/Dental Insurance Plan will be instituted similar to other TWA employees.
- Early retirement benefits after March 7, 1986 are reduced by 5% for each year preceding the 60th birthday; effective 3/7/86, the Lump Sum distribution option will be computed on the basis of 2% above the prevailing Pension Benefit Guarantee Corporation rate. These changes do not affect retirement benefits accrued up to the date the changes are effective (lump sum benefit amount accrued to date will not be reduced).
- F/A's will be permitted to mutually trade domiciles.
- Single hotel rooms provided for training away from domicile.
- One day room for every three F/A's on layovers over 4 hours when no lounge facility is available.
- Displacement benefits of unlimited Class 9 passes for 18 months (first 12 months service charge free) from the TWA city closest to your home to your new domicile.
- New displacement option for domestic service managers and domestic C/A's allows them to displace the most junior international C/A on the system or at the same location.
- Priority recall from furlough or 12B leaves, to domicile and classification for active F/A's prior to the processing of all other bids on file.
- Recall Bypass allows F/A's to elect to be passed over at time of recall up until the recall of the last furloughee. (Note: 5 year limitation remains in effect.)
- No loss of F/A seniority to F/A's who enter In Flight Services Management or F/A associated management (Article 10(C)) and retroactive credit will be given for time spent in management.
- Management on company business may use XCAP-2 if no cabin seats are available.

- Seniority will determine cabin seat assignments among all deadheading crew members, regardless of rank and among all XCAP's and ACM's, regardless of rank.
- A domestic flight is any flight which operates within the North American continent and the Caribbean.
- An international flight is any flight which either departs or arrives at a station outside the North American continent and the Caribbean.
- Domestic segments may be included in an international paring, i.e. "tag ends" before and/or after an international flight.

Domicile Minimum Rest:

From International flight to International flight	= 24 hours
From International flight to Domestic flight	= 24 hours
From Domestic flight to International flight	= 16 hours
From Domestic flight to Domestic flight	= 10 hours

- Any portion of the 16 or 24 hours rest outlined above may be waived by F/A only and such waived rest will not be restored.
- All bid holders will receive prescheduled GDO's in their line of time.
- A minimum of 48 hours (spacing) will be provided between international flight in published sequences.

Layover Minimum Rest:

Domestic — as in current Article 6-A(S)
International — 12 hours scheduled, reduceable to 10 hours actual
Note: 8 in 24 rules no longer apply.

- Same Day Balancing for Recovery Balancing will be same as today's rules PRIOR to the 20th of the month. If not

accomplished prior to the 20th and/or the F/A has not self balanced by that time, the Company may balance anytime after the 20th of the month except on GDO's. If F/A is scheduled to be unavailable after the 20th of the month (vacation, PTO, etc.) the Company may balance anytime during the month except on GDO's.

- Union dues checkoff will be suspended.
- Notice of line seniority changes will be given to IFFA.
- 3 year Agreement.
- No Sympathy Strike.
- Standby, Callout and Holding Time will be credit/pay items.
- Crew Complement

(1) Basic Understaffing Penalty Pay will be limited to $8.00 per hour per F/A working, regardless of understaffing level on a given flight.

(2) For commercial and charter flights, basic understaffing crew complement *penalty will be paid* if the crew complement falls below:

International	Equipment	Domestic
FSM + 9 C/A's	747	FSM + 8 C/A's
FSM + 7 C/A's	SP	FSM + 6 C/A's
FSM + 7 C/A's	1011	FSM + 6 C/A's
FSM + 4 C/A's	767	FSM + 4 C/A's
FSM + 3 C/A's	727S/DC-9-80	FSM + 2 C/A's
FSM + 3 C/A's	727R	FSM + 2 C/A's

Note: FSM's on Domestic narrow body flights will not be effective until a later date. In the interim, the basic crew complement on narrow body flights will consist of C/A's only

Note: Entry requirement for FSM will be 2 years served as a F/A.

Eliminated

- 707/747 differential (Code 92)
- Dinner Jacket Cleaning Allowance (Code 48)
- FSM Override (Code 102)
- Purser Category (current pursers will be displaced to International C/A's at their current locations).
- Exclusive Domestic Ground Transportation (Article 4(A)(5)(a)). (Domestic transportation will be shared by pilots and F/A's.)
- Crew Meal Penalty Payment (Article 4(C)(4)).
- Inversal and Move Up Protection (Articles 6-A(Q)/6-B(R)).
- Last Trip Guarantee (Articles 6-A(Y)/6-B(V)).
- 8 in 24 Rules (Articles 6-A(R)/6-A(T)).
- Trips Missed for Vacation (Articles 6-A(E)/6-B(F)). (The daily rate will apply for vacation.)
- Article 9F.
- Understaffing Penalty for lack of additional F/A's (Article 26 (A)(2)).
- International Quarterly Limits (the flexible monthly cap of 70-85 credit hours per month will replace the quarterly limits).
- Pay for Union Reps and Union Offices (Article 16(A)(3)(a)/16(B)).
- Reopener Provision—Article 27(C).

/s/ WILLIAM S. BORDEN
William S. Borden

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

Case No. 86-6059-CV-SJ-6

TRANS WORLD AIRLINES, INC.,
Plaintiff,

vs

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Defendant.

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED, that on this 12th day of July, 1986, the above-entitled matter comes on for hearing before The Honorable Howard F. Sachs, Judge of Division No. 6 of the United States District Court for the Western District of Missouri, Western Division, sitting in Kansas City, without a jury.

APPEARANCES

The Plaintiff appears by and through its attorneys of record, Mr. Murray Gartner of Messrs. Proskauer, Rose, Goetz & Mendelsohn, 300 Park Avenue, New York, New York 10022; Mr. Michael Katz, Assistant General Counsel, Trans World Airlines, New York, New York; and Mr. Mark Foster and Ms. Mary Ann Tyrrell of Messrs. Stinson, Mag & Fizzell, 2000 CharterBank Building, Kansas City, Missouri.

The Defendant appears by and through its attorneys of record, Messrs. William C. Jolley, Jr., Steven Fehr, Scott Raisher and Doyle R. Pryor of Messrs. Jolley, Walsh, Hager & Gordon, 1300 Bank of Kansas City Building, Kansas City, Missouri.

INDEX

	PAGE
PRESENTATION BY MR. GARTNER	7
PRESENTATION BY MR. FEHR	41
REPLY BY MR. GARTNER	76
REPLY BY MR. FEHR	87

---

[13] don't believe is mentioned in the brief. I believe it is Ruby against American Airlines, where American had them negotiating with the Pilot's Union for a long period of time over a new agreement and had reached an impasse and had received notice from the National Mediation Board that the 30-day period was about to begin, and it then served another Section 6 notice.

This occurred in around 1961, when the jets were first coming into use, and American had no agreement with the Pilot's Union as to the working conditions with respect to jets. All they had were agreements on piston planes.

American served another Section 6 notice asking for negotiations about the working conditions to apply when they put jet planes into effect. The Court said, "Well, this is just not within the contemplation of the Railway Notice Act. You can't serve another Section 6 notice and extend the status quo period."

But the practice is different under the railroad contract because of the form of the contract. The contract specifically provides that all of the rules will be effective on a certain date and will continue, not the agreement will continue, but the rules will continue, until changed by a Section 6 notice.

The railroads serve separate Section 6 notices **[14]** with respect to each rule, and the way in which they achieve some kind of stability is with respect to major rules, such as wages or other benefits, and once they have reached a national agreement on that they may then agree on a moratorium on the service of Section 6 notices for three years, four years, or two years, on those subjects.

But either the carrier or the union is still free to serve a Section 6 notice with respect to any of the other rules on which there is no moratorium. That is simply not the practice in the airline industry and it never has been.

THE COURT: In referring to practice in the industry, you have cited Burgoon. I doubt that we have that article.

MR. GARTNER: The National Mediation Board, Your Honor, issued a collection of discussions of various sections of the Railway Labor Act entitled "The Railway Labor Act At Fifty." Mr. Fehr, thank you for handing it up to the Court.

It occurred to me before, I believe I was told sometime ago that was out of print, which is maybe why Your Honor has had difficulty finding it.

THE COURT: I confess I didn't make a great search for it. I thought maybe the lawyers would help me

[27] THE COURT:—the law of the jungle and the community now destroyed by the strike and all that?

MR. GARTNER: Your Honor, you may disbelieve me, but I am glad you asked that question. Again, not only was it unnecessary, it is simply wrong. It is absolutely—now, on this point I have no hesitancy in saying that Justice Douglas was wrong, because there is no question—this is dicta, this is not the decision—there is no question that the carrier could have served a comprehensive Section 6 notice which changed all of the provisions of the agreement.

By coincidence, Your Honor, in fact, that is what the railroad did. I have among my papers the proposal which the railroad made for a completely new contract to cover all the unions. Justice Douglas was not complaining about that.

What he was saying was that the railroad under the statute had to go through all of the procedures of the Act in order to affect those changes. He was not saying that if they had gone through all of those procedures and got the right to affect those changes that the parties would be reduced to the law of the jungle.

That would have been the right of the railroad at that time to institute those changes. All that he was saying was that since they had not gone through the **[28]** procedures required for an existing contract, if they tried to make those changes without going through those procedures, that would be the law of the jungle.

But he was not saying that any provisions that they wanted in a contract, removing the entire old agreement, would return the parties to the law of the jungle. In that aspect, many of the statements which are made in that opinion are simply unrealistic.

I mean Justice Douglas says that it would be, and these are not exactly his words, but it would be kind of a sandbagging technique for an employer who wanted to make a major change to precipitate a strike over a minor—not a minor dispute in the technical language of it, but over a small dispute, as he called it a simple dispute—to precipitate a strike over a single dispute and then face the union with the announcement that they were going to change major things.

I have thought and thought and thought about that statement, and I simply cannot make sense of it, Your Honor. If a railroad or an airline, or any other company subject to the Railway Labor Act, was willing to precipitate a strike in order to achieve a certain objective, why should they precipitate it over a single issue and then make the change that they really want to make?

Notation Pursuant To Item 2(c)
of the Clerk's Memorandum Re Printing

Excerpts from stipulations, filed on July 21, 1986, in Civil Action No. 86-6084-CV-SJ-6 in the U.S. District Court for the Western District of Missouri, have been omitted in printing this joint appendix because they appear at pages 111a to 115a in the appendices to the printed Petition for Certiorari.

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-1998

TRANS WORLD AIRLINES, INC.,

Plaintiff-Appellant,

vs.

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Defendant-Appellee.

AFFIDAVIT OF PAUL E. DONNELLY

Paul E. Donnelly, being duly sworn, states as follows:

1. I am a member of the law firm of Stinson, Mag & Fizzell, 2000 CharterBank Center, Kansas City, Missouri, 64106 and one of the attorneys of record for appellant Trans World Airlines, Inc.

2. There are currently pending in the United States District Court for the Western District of Missouri, before the same United States District Judge (Hon. Howard F. Sachs), three related actions between the Independent Federation of Flight Attendants ("IFFA") and Trans World Airlines, Inc.

3. Each action grows out of the strike conducted by IFFA against Trans World Airlines, Inc., which commenced on March 7, 1986.

4. Attached hereto as Exhibit 1 is a true and correct copy of pages 1, 2, 3 and 40, 41, 42 and 43 of Count I of IFFA's Third Amended Complaint, filed in the case styled *Independent Federation of Flight Attendants* v. *Trans World Airlines, Inc.*, No. 86-6030-CV-SJ-6 on July 17, 1986. Pages 40 to 43 contain IFFA's prayer for relief on that Count.

5. Attached hereto as Exhibit 2 is a true and correct copy of IFFA's Complaint filed in the case styled *Independent Federation of Flight Attendants* v. *Trans World Airlines, Inc.*, No. 86-6084-CV-SJ-6, on June 24, 1986.

6. Attached hereto as Exhibit 3 is a true and correct copy of pages 1, 51 and 52 of the Affidavit of William S. Borden, Vice President of In-Flight Services for Trans World Airlines, Inc., which was filed by the appellant on August 12, 1986 in the case of *Independent Federation of Flight Attendants* v. *Trans World Airlines, Inc.*, No. 86-6084-Cv-SJ-6.

/s/ PAUL E. DONNELLY
Paul E. Donnelly

Subscribed and sworn to before me this 18th day of August, 1986.

/s/ HELEN M. WARR
Notary Public

HELEN M. WARR
Notary Public—State of Missouri
Commissioned in Jackson County
My Commission Expires September 25, 1987

My Commission Expires: Sept. 25, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Civil Action No. 86-6030-CV-SJ-6

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS

and

VALERIE COLLINS-COADY, MARGARET A. HARTZ, CUKY P. HARVEY, BRUCE KENNETH PALMER, BEONCA ES LANDA RIST, NANCY WRIGHT, individually and as a class representing those flight attendants employed by Trans World Airlines, Inc., who were or should have been on sick, medical, disability or other authorized leave, whether work-related or not, as of midnight, March 6, 1986

and

ELIZABETH RICH-KOUKLELIS, individually and as a class representing those flight attendants employed by Trans World Airlines, Inc., who were or may become eligible to retire on or after March 7, 1986

and

DESSA JANE BURRELL, individually and as a class representing all flight attendants employed by Trans World Airlines, Inc., as of midnight, March 6, 1986 whose active service terminated due to the IFFA strike

and

MICHAEL ALEX MCDERMOTT, individually and as a class representing all flight attendants employed by Trans World Airlines, Inc., who had monies deducted from their March payroll or other wage-related checks by TWA for additional life insurance and/or HMO premium differentials for March coverage,

Plaintiffs,

vs.

TRANS WORLD AIRLINES, INC.

and

THE TWA GROUP BENEFITS PLAN
FOR FLIGHT ATTENDANTS

and

THE TWA RETIREMENT PLAN FOR FLIGHT ATTENDANTS

and

BOSTON SAFE DEPOSIT AND TRUST COMPANY

and

CONNECTICUT GENERAL LIFE INSURANCE COMPANY

and

TOTAL HEALTH CARE, individually and as a class representing all health maintenance organizations in which any flight attendants employed by Trans World Airlines, Inc. as of midnight, March 6, 1986 were members, enrollees or participants on that date

and

N. J. STAFFORD, WILMA RIGHTER, CRAIG MUDGE, individually and as a class representing all persons in a supervisory, managerial or other control position who made or participated in any decision, act, conduct or policy regarding termination or threatened termination or otherwise resulting in denial or threatened denial of group insurance plan coverage and benefits for flight attendants employed by Trans World Airlines, Inc., as of midnight, March 6, 1986,

Defendants.

THIRD AMENDED COMPLAINT

Come now Plaintiffs, and, leave of Court having been first obtained, file this Third Amended Complaint, and, for their claims against Defendants, state the same in three (3) counts (Counts I, II and III) as to Trans World Airlines, Inc. (hereinafter "TWA") and in two (2) counts (Counts II and III) as to all Defendants as follows:

Count I

1. JURISDICTION. This action arises under and this Court's jurisdiction is invoked pursuant to the Railway Labor Act (hereinafter "RLA"), as amended, 45 U.S.C. § 151, *et seq.*, and 28 U.S.C. § 1331 and 28 U.S.C. § 1337.

2. VENUE. Venue properly lies in this judicial district pursuant to 28 U.S.C. § 1391.

3. THE PARTIES.

(1) *The Plaintiff.* Plaintiff The Independent Federation of Flight Attendants (hereinafter "IFFA" or the "Union") is a voluntary, unincorporated labor organization with its principal office and headquarters located at 630 Third Avenue, New York, New York. On * * *

[40] and exert every reasonable effort to make and maintain agreements so as to avoid interruption in commerce; constitute an unlawful resort to self-help by TWA and are in violation of the prohibition under § 2 Seventh and the status quo provisions of the RLA against the carrier's unilateral change in rates of pay, rules and working conditions of its employees until exhaustion of the RLA's mandatory procedures and then only with respect to proposed changes or changes necessary to continue operations; and, are an improper and unlawful interference with, influence on or coercion of its employees by TWA prohibited under § 2 Fourth of the RLA.

WHEREFORE, Plaintiffs pray for the following relief under Count I of this Third Amended Complaint:

1. That the Court issue a declaratory judgment:

(1) finding that TWA's actions and course of conduct throughout these negotiations (including but not limited to those matters specifically mentioned in each and every Count of this Third Amended Complaint) have been in bad faith and in violation of the RLA;

(2) finding that IFFA's strike was caused and/or prolonged in whole or in part by the aforesaid unlawful actions and course of conduct of TWA and, therefore, has the status of an unfair labor practice strike;

(3) finding that all employees engaged in said strike are "unfair labor practice strikers" and as such are entitled to reinstatement to their jobs as of their unconditional offer to return to work, notwithstanding that alleged "permanent" **[41]** replacements have been hired, and even if those replacements must be displaced;

(4) finding that purported "replacement" employees and other non-flight attendant employees cannot be discharged by TWA for exercising their rights under § 2 Fourth of the RLA by becoming members of IFFA and/or joining or otherwise supporting the IFFA strike and withholding their labor from TWA;

(5) finding that disability status and disability income payments cannot be denied by TWA to flight attendants who were or should have been on non-work-related sick, medical, disability or other authorized leave at the time of the strike who are otherwise entitled thereto; and,

(6) finding that flight attendants who were or may become eligible to retire on or after March 7, 1986, and who are otherwise entitled thereto cannot be denied by TWA the retiree passes and retiree insurance coverage and benefits provided for under the Agreement and the Plan operated in accordance therewith, nor are such flight attendants required to return to active service in order to become eligible for and receive such benefits.

2. That the Court issue a permanent injunction requiring and compelling TWA, its officers, agents, representatives and other persons acting in concert with them or on their behalf:

(1) to cease and desist from any further discharge of employees for exercising their rights under § 2 Fourth of the RLA;

(2) to notify all employees, including those described in Paragraph 2(1) above, of their employment status and the **[42]** effect of any exercise of their rights under § 2 Fourth of the RLA on such employment status consistent with the Court's findings and orders;

(3) to grant extensions to medical leaves of absence to eligible flight attendants and to provide and pay sick pay and industrial injury compensation as adjusted by state work compensation benefits and group insurance coverage and benefits, including disability income payments, for flight attendants who were or should have been on sick, medical, disability or other authorized leave, whether work-related or not, at the time of the strike and who are otherwise entitled thereto retroactive to March 7, 1986, with payment of interest thereon as provided by law;

(4) to reimburse flight attendants described in Paragraph 2(3) above for any conversion premiums and medical or other covered expenses which they have paid or which were payable under industrial injury compensation benefits coverage, with payment of interest thereon as provided by law;

(5) to notify in writing all flight attendants described in Paragraph 2(4) above of their compensation and group insurance coverage and benefits status consistent with the Court's findings and orders;

(6) to notify all flight attendants who were of may become eligible to retire on or after March 7, 1986 of their retiree passes and retiree insurance coverage and benefits

status consistent with the Court's findings and orders; and,

(7) to return any portion of monies deducted from **[43]** flight attendants' March checks for additional life insurance and/or HMO participation for March coverage which were not forwarded to Connecticut General and/or the applicable HMOs or for which coverage was not provided, with payment of interest thereon as provided by law; or, in the alternative, to provide coverage for the entire period for which said monies were deducted.

(8) to refrain from implementing any flight attendant rules/rates of pay and working conditions inconsistent with the 1983 collective bargaining agreement other than matters which have been the subject of § 6 Notices and negotiations; and to immediately reinstate any such working conditions which have been illegally altered since March 7;

(9) to treat exclusively with IFFA regarding any and all matters involving alteration or administration of flight attendant rules, rates of pay or working conditions.

3. That the Court retain jurisdiction pending compliance with its orders.

4. That the Court grant Plaintiffs their cost and attorneys' fees herein incurred, including payment of interest thereon as provided by law and such other relief as this Court deems just and proper.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

Civil Action No. 86-6084-SJ-8

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS, an Unincorporated Labor Organization, 630 Third Avenue, New York, New York 10017,

Plaintiff,

vs.

TRANS WORLD AIRLINES, INC., Kansas City International Airport Kansas City, Missouri,

Defendant.

FIRST AMENDED COMPLAINT

Comes now Plaintiff, the Independent Federation of Flight Attendants (hereinafter "IFFA") and for its complaint against Defendant, Trans World Airlines, Inc. (hereinafter "TWA"), states the following:

COUNT ONE

1. This action arises under and this Court's jurisdiction is invoked pursuant to the Railway Labor Act as amended, (hereinafter "RLA"), 45 U.S.C. § 151, *et seq*., and 28 U.S.C. § 1331 and 28 U.S.C. § 1337. This Court has jurisdiction under 28 U.S.C. § 2201 to grant the declaratory relief requested.

2. Venue properly lies in this judicial district pursuant to 28 U.S.C. § 1391.

3. Plaintiff IFFA is a voluntary, unincorporated labor organization with its principal office and headquarters located at 630 Third Avenue, New York, New York. Since April 1, 1977, IFFA has been and is certified by the National Mediation Board (hereinafter "NMB") as the duly designated and authorized exclusive bargaining representative under the RLA of all TWA employees in the flight attendant craft or class, including flight attendants in this judicial district.

4. Plaintiff IFFA is a "representative" within the meaning of the RLA and is subject to its provisions.

5. Defendant TWA is a corporation duly organized and existing under the laws of the State of Delaware and is engaged in the common carriage by air in interstate and foreign commerce of persons, property and mail. TWA maintains offices, an overhaul base, and a training center in this judicial district, and operates flights to and from the Kansas City International Airport which is located within this judicial district.

6. Defendant TWA is a "common carrier by air", within the meaning of Title II of the RLA, and accordingly a "carrier" within the meaning of Title I of the RLA, and is subject to the provisions of the RLA.

7. On April 12, 1983, TWA and IFFA signed an Agreement (hereinafter "the 1983 Agreement"), establishing the rates of pay, rules and working conditions of the flight attendants in the service of TWA.

8. Under Article 1 of the 1983 Agreement, all TWA flights which require flight attendants on board the aircraft must be operated in accordance with the provisions of the Agreement, and all flight attendants employed by TWA are subject to the provisions of the Agreement.

9. Under Article 2 of the 1983 Agreement TWA flight attendants are classified into three categories, cabin attendants, flight pursers, and service managers. Each of those flight attendant categories is defined in Article 2 of the Agreement.

10. Article 28 of the 1983 Agreement provides, with respect to the duration of said agreement:

> Except as otherwise specified in this Agreement, this entire Agreement shall be effective August 1, 1981 and shall remain in effect until July 31, 1984 and thereafter shall renew itself without change for yearly periods unless written notice of intended change is served in accordance with Section 6, Title I of the Railway Labor Act, as amended, by either party hereto, at least ninety days prior to the renewal date each year.

11. By letter dated February 29, 1984, and pursuant to Section 6 of the RLA, 45 U.S.C. § 156, and Article 28 of the 1983 Agreement, TWA served upon IFFA notice of intended changes in the Agreement and TWA's proposals relating to such changes.

12. By letter dated April 27, 1984, and pursuant to Section 6 of the RLA and Article 28 of the 1983 Agreement, IFFA served upon TWA notice of intended changes in the Agreement and IFFA's proposals relating to such changes.

13. Between March 29, 1984 and March 6, 1986, IFFA and TWA representatives met in conference on numerous occasions to discuss said proposed changes in the Agreement.

14. On or about May 13, 1984, TWA invoked the services of the NMB to assist the parties, through mediation, in reaching agreement. The NMB docketed the dispute and, on or about July 12, 1984, appointed a mediator to assist the parties in their negotiations.

15. No agreement had been reached in the TWA-IFFA negotiations by February 4, 1986 and on that date, in accordance with RLA Section 5 first, the NMB notified TWA and IFFA that the 30-day "cooling off" period mandated by RLA Section 5 First had begun.

16. Pursuant to that notification, if the parties were unable to arrive at a mutually acceptable agreement by midnight, March 6, 1986, both parties would be free to resort to self-help.

17. On March 5, 1986, IFFA commenced an action in the United States District Court for the Western District of Missouri, Civil Action No. 86-6030-CV-SJ-6, alleging, *inter alia*, that TWA had violated the RLA by failing to exert every reasonable effort to reach agreement and seeking a temporary restraining order to enjoin TWA from unilaterally implementing any proposed changes in flight attendant rates of pay, rules or working conditions or taking any other action that would alter the then existing status quo. IFFA's request for a temporary restraining order was denied on March 5, 1986.

18. The parties were unable to agree upon acceptable changes to the agreement by midnight, March 6, 1986. IFFA commenced a strike against TWA in the first hour of Friday, March 7, 1986. Also, TWA announced its intention to unilaterally implement many of its previously proposed changes in flight attendant rates of pay, rules and working conditions.

19. On March 18, 1986, IFFA filed an amended complaint in Civil Action No. 86-6030-CV-SJ-6 alleging, *inter alia*, that IFFA's strike was caused in whole or in part by unlawful actions of TWA and requesting *inter alia* that the court issue a declaratory judgment that IFFA's strike was an unfair labor practice strike and that all employees engaged therein were unfair labor practice strikers and as such are entitled to reinstatement to their jobs upon an unconditional offer to return to work, notwithstanding that "permanent replacements" have been hired.

20. IFFA still contends that its strike was an unfair labor practice strike and that its striking members are entitled to reinstatement to their jobs as unfair labor practice strikers upon an unconditional offer for the strikers to return to work.

21. IFFA's strike continued until May 17, 1986 when IFFA made an unconditional offer to TWA on behalf of all striking flight attendants to return to work.

22. On information supplied by TWA, at various times in the weeks and days preceding March 7, 1986, TWA offered to hire in excess of 1,274 individuals as flight attendants commencing their employment on or about March 7, 1986. Said offers stated that if said individuals would take certain steps, including notification to TWA that they were able to commence working on March 7, 1986 and reporting in person when notified to so, "you will become an employee of TWA on that day regardless of whether or not a work stoppage occurs and subject to immediate duty assignment".

23. Pursuant to said offers, on information supplied by TWA, approximately 1,274 individuals were hired during the week beginning March 7, 1986 as flight attendants. Said individuals were hired, not as "permanent replacements" for striking flight attendants, but rather as permanent additions to TWA's flight attendant work force. As of May 17, 1986, on information supplied by TWA, approximately 1,220 of said individuals were still working as flight attendants. All or nearly all of said individuals have less seniority and/or length of service with TWA than the flight attendants who were on strike until May 17, 1986.

24. On information supplied by TWA, as of May 17, 1986, the date of IFFA's unconditional offer on behalf of the strikers to return to work, approximately 463 individuals were enrolled in training classes at TWA's Training Center in Kansas City, Missouri in an effort to become qualified to be employed as flight attendants. At the time of IFFA's unconditional offer on behalf of striking flight attendants to return to work, those individuals who had not yet completed the required training to qualify as flight attendants were not employed, and could not lawfully be employed, as flight attendants, and therefore, were not and are not "permanent replacements" for striking flight

attendants. On information and belief, certain of those individuals who were still trainees as of May 17, 1986, have completed training since that date and have been employed in flight attendant positions, while other such trainees failed to complete training or were unsuccessful in their efforts to become qualified as and be hired to be flight attendants.

25. On information supplied by TWA, TWA continued after May 17, 1986, to temporarily utilize non-flight attendant employees (such as reservation agents, etc.) to work as "contingency" flight attendants. Such temporary "contingency" employees were not and are not "permanent replacements" for striking flight attendants.

26. At various times during IFFA's strike prior to IFFA's May 17, 1986 unconditional offer to return to work, approximately 1,300 striking flight attendants abandoned the strike and returned to work as flight attendants for TWA (they shall hereinafter the referred to as "cross-over strikers"). Those cross-over strikers were not and are not "permanent replacements" for the flight attendants who continued to strike until May 17, 1986 (who shall hereinafter be referred to as "full-term strikers"). Many of the full-term strikers have greater seniority and/or length of service with TWA than many of the cross-over strikers.

27. Despite IFFA's continuing contention that its strike was an unfair labor practice strike and that TWA, having received an unconditional offer to return to work, must reinstate all the full-term strikers to their jobs, TWA contends that IFFA's strike was solely an economic strike, not an unfair labor practice strike, and TWA has failed and refused to reinstate all the full-term strikers to their jobs.

28. By letter dated May 23, 1984, TWA notified IFFA that it has frozen its active permanent Flight Attendant work force and has placed all full-term strikers on a preferential rehire list from which they shall be rehired for active service, if immediately available for such service, to fill vacancies in order of seniority.

29. By letter dated May 28, 1986, TWA notified IFFA that it has recalled to employment only 197 of the approximately 5,000 full-term strikers.

30. On information and belief, TWA has assigned some number of the recalled 197 full-term strikers and has announced that it will in the future continue to assign some full-term strikers to be recalled in the future to job categories and/or domicile cities other than those held by such full-term strikers at the time of the commencement of the strike.

31. On information and belief, TWA is treating the flight attendants described above in paragraphs 22 and 23 who were hired as permanent additions to the flight attendant work force on or after March 7, 1986, as if they were permanent replacements for full-term strikers.

32. On information and belief, TWA is treating the individuals who as of May 17, 1986 were still in training attempting to become qualified to be employed as flight attendants as if they were permanent replacements for full-term strikers.

33. On information and belief, TWA has discriminated against and continues to discriminate against many of the full-term strikers because of their exercise of the right to strike under the RLA by failing and refusing to reinstate them to flight attendant positions occupied on and after May 17, 1986 by:

(a) Cross-over strikers who have less seniority and/or length of service with TWA;

(b) The post-March 7, 1986 permanent additions to the flight attendant work force who likewise have less seniority and/or length of service with TWA;

(c) The temporary non-flight attendant "contingency" employees who continued to work as flight attendants after May 17, 1986; and

(d) The individuals who, as of May 17, 1986, had not yet completed the training necessary to be qualified to be employed as flight attendants.

34. On information and belief, TWA has refused and continues to refuse to allow flight attendants who were never on strike (those who as of March 7 and thereafter were or should have been on an authorized leave or leave of absence) to return to their former job categories and/or domicile cities upon expiration of their authorized leaves, in effect treating them as full-term strikers.

35. Irrespective of whether IFFA's strike was an unfair labor practice strike as IFFA contends or an economic strike as TWA contends, TWA's conduct described herein violates the RLA, 45 U.S.C. §§ 151 *et seq.*

WHERFORE, plaintiff respectfully requests that this court grant the following relief:

(a) Consolidation of this action with *Independent Federation of Flight Attendants v. Trans World Airlines, Inc.*, Civil Action No. 86-6030-CV-SJ-6, now pending before this Court;

(b) A declaratory judgment stating that pending the court's determination of the issues presented in Civil Action No. 86-6030-CV-SJ-6, TWA is required by the RLA to reinstate full-term strikers in seniority order to their former job categories and domicile cities to the extent that those flight attendant positions may after May 17, 1986 have been occupied by:

(1) Cross over strikers who have less seniority and/or length of service with TWA;

(2) The post-March 7, 1986 permanent additions to the flight attendant work force who have less seniority and/or length of service with TWA;

(3) The temporary non-flight attendant "contingency" employees who continued to work as flight attendants after May 17, 1986; and

(4) The individuals who, as of May 17, 1986, had not yet completed the training necessary to be qualified to be employed as flight attendants.

(c) A declaratory judgment stating that TWA is required to permit those flight attendants who were never on strike (those who as of March 7, 1986 and thereafter were or should have been on an authorized leave or leave of absence) to return to their former job categories and domicile cities upon expiration of their authorized leaves.

(d) A judgment for backpay and all other benefits of employment necessary to make whole those full-term strikers and non-strikers whose reinstatement rights under the RLA are being or will have been violated by TWA's conduct described herein by time of trial.

(e) Such other or additional relief as shall be deemed appropriate.

COUNT TWO

36. Plaintiff hereby realleges and incorporates by reference all the allegations set forth in paragraph 1 through 35 of Count One above.

37. On information supplied by TWA, at various times after the first week of the strike, approximately 1,127 individuals were hired as purported "permanent replacements" for striking flight attendants. Said individuals were in additon to the approximately 1,220 permanent additions to the work force described in paragraphs 22, 23 and 31 of Count One and the approximately 463 trainees described in paragraphs 24 and 32 of Count One. Thus, based upon information supplied by TWA, as of May 17, 1986, there were a total of approximately 2,810 individuals TWA contends were and are "permanent replacements" for full-term strikers.

38. TWA had no legitimate and substantial business justification for hiring purported "permanent replacements", as distinguished from temporary replacements, in order to continue to operate during the strike.

39. Since IFFA's May 17, 1986 unconditional offer on behalf of the full-term strikers to return to work, TWA has discriminated against and continues to discriminate against each and every full-term striker because of her/his exercise of the right to strike under the RLA by failing and refusing to reinstate each of them, to the flight attendant position she/he held prior to the strike.

WHEREFORE, plaintiff respectfully requests that this court grant the following relief:

(a) Consolidation of this action with *Independent Federation of Flight Attendants v. Trans World Airlines, Inc.*, Civil Action No. 86-6030-CV-SJ-6, now pending before this Court;

(b) A declaratory judgment stating that from and after the May 17, 1986 unconditional offer to return to work, TWA was and is required by the RLA to reinstate each and every full-term striker in seniority order to his/her former job category and domicile city.

(c) A judgment for backpay and all other benefits of employment necessary to make whole those full-term strikers whose reinstatement rights under the RLA have been, are being or will have been violated by TWA's conduct described herein by time of trial.

(e) Such other or additional relief as shall be deemed appropriate.

JOLLEY, WALSH, HAGER & GORDON
1125 Grand Avenue, Suite 1300
Kansas City, Missouri 64106

By: /s/ WILLIAM A. JOLLEY
William A. Jolley

By: /s/ DOYLE R. PRYOR
Doyle R. Pryor

[Certificate of Service omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

Civil Action No. 86-6084-CV-SJ-8

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS, an Unincorporated Labor Organization, 630 Third Avenue, New York, New York 10017,

Plaintiff,

vs.

TRANS WORLD AIRLINES, INC., Kansas City International Airport Kansas City, Missouri

Defendant.

STATE OF NEW YORK,
COUNTY OF NEW YORK ss.:

William S. Borden, being duly sworn, deposes and says:

1. I am Vice President, In-Flight Services for Trans World Airlines, Inc. ("TWA"). I have been employed by TWA for about 35 years, first as a Flight Purser, and thereafter in a succession of management positions including Manager—Hostess, Purser Training; General Manager—In-Flight Services at JFK; Director In-Flight Services Training and Staff Vice President, In-Flight Services.

92. On the same day, Mr. Hoar wrote to a former striker.

> "First of all, welcome back to work. Along with over 700 of your fellow Flight Attendants, you've made the difficult but prudent decision to return as an active employee.
>
> * * *
>
> Let me repeat Carl Icahn's earlier assurance,that if and when a contract settlement is reached, under no circumstances will newly hired or other working Flight Attendants be furloughed to make room for returning strikers."

A copy of the letter is appended hereto as Exhibit B-26.

93. Among the April crossovers was a former long-term IFFA officer and one of IFFA's 1986 strike coordinators. Both were treated in the same way as all other returning strikers. They were reinstated to available vacancies, and credited with full pre-strike line seniority.

94. A letter I received in April from a crossover who had not been a union activist explained the reasons for her decision. A copy of her letter, showing how difficult that decision was for her, as it must have been for many strikers, is appended hereto, with her name redacted, as Exhibit B-27. The decision to return and continue working was made more painful for many crossovers who, while considering their decision or after making it, received signed or anonymous messages from striking flight attendants. Those messages, many of which I have seen, ranged from assurances of future ostracism to obscene and insulting remarks, and in some cases death threats or threats of bodily injury.

95. Flight Attendants who returned to work after having been on strike were assigned by TWA to available vacant positions. In some cases, they returned to the domicile to which they had been assigned before the strike. In other cases, there was no vacancy at the pre-strike domicile and they were assigned elsewhere. In some cases, returning Cabin Attendants with sufficient pre-strike seniority were assigned to Service Manager positions, at their pre-strike domicile or elsewhere. Some former Service Managers elected to become Cabin Attendants to remain at their pre-strike domicile or to transfer to a more desirable one. The Purser position was abolished as of March 7, 1986, and former Pursers returned as Cabin Attendants or Service Managers. Effective April 1, 1986 Kansas City became a satellite operation for St. Louis. Flight attendants then assigned to Kansas City elected to be reassigned to St. Louis, with the exception of one who bid for and was awarded a position at another domicile.

96. TWA assigned returning flight attendants their pre-strike line seniority for bidding purposes—in bidding

PETITIONER'S

BRIEF

No. 86-1650

Supreme Court, U.S.
FILED
AUG 12 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1986

TRANS WORLD AIRLINES, INC.,

Petitioner,

vs.

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONER

MURRAY GARTNER
Proskauer Rose Goetz
& Mendelsohn
300 Park Avenue
New York, New York 10022
(212) 909-7000
(Counsel of Record)

PAUL E. DONNELLY
Stinson Mag & Fizzell
920 Main Street
Kansas City, Missouri 64105

MARK A. BUCKSTEIN
MICHAEL A. KATZ
605 Third Avenue
New York, New York 10158

Attorneys for Petitioner

Of Counsel
Carole O'Blenes

QUESTION PRESENTED

After the stated term of a collective bargaining agreement, and after the parties have been released by the National Mediation Board to engage in self-help, does the Railway Labor Act (unlike the National Labor Relations Act) mandate that the carrier enforce the union security provisions of that agreement so as to compel the carrier's employees (almost all strike replacements and others who have resigned union membership) to pay union dues as a condition of their continued employment?

PARTIES

The petitioner is Trans World Airlines, Inc. ("TWA"), a "common carrier by air" within the meaning of Title II of the Railway Labor Act. TWA has no parent company, and no affiliates or subsidiaries other than wholly owned subsidiaries.

Respondent, The Independent Federation of Flight Attendants, is an unincorporated labor organization designated as the bargaining representative under the Railway Labor Act of TWA employees in the flight attendant craft or class.

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Statutes Involved	2
Statement of the Case	2
The Controlling Facts	4
Inception of This Action	7
The District Court Decision	7
The Court of Appeals Decision	8
Summary of Argument	12
Argument	18
I. After the Status Quo Period Has Ended Without Agreement, the RLA (Like the NLRA) Neither Requires Nor Permits Compulsory Union Membership As a Condition of Employment	18
A. Under the RLA and the NLRA, Union Security Arrangements Are Purely Consensual; They May Not Be Imposed By Operation of Law Absent Explicit Statutory Authorization.	20
B. The Court Below Articulated No Reasoned Basis (and There Is None) for the Dichotomy It Purported to Find in National Labor Policy.	26
II. The Court Below Misapplied This Court's Decision in *Florida East Coast Railway*	30

	PAGE
A. *FEC*: The Act Permits Limited Departures From an *Existing* Agreement In Order to Preserve a Carrier's Right to Self-Help	31
B. The Eighth Circuit Misconceived Both the Legal Premises of *FEC* and the Controlling Facts of This Case	33
III. The "Special Rule" Announced By the Court Below Is Not Required By the Terms, the Purposes or the Spirit of the RLA and, By Undermining the Collective Bargaining Process, Would Disserve the Principal Objective of the Act—the Voluntary Adjustment of Labor Disputes	38
A. The Act Does Not Require "Continuing Agreements Between Management and Labor"	39
B. The Act Does Not Authorize Judicial Imposition of a "Partial" Status Quo After the Statutory Procedures Have Been Exhausted	43
C. If Allowed to Stand, the Eighth Circuit's "Special Rule" Will Engender Unnecessary Disputes, Disturb the Bargaining Atmosphere That the Act Seeks to Create, and Alter the Incentives for Voluntary Agreement	47
Conclusion	50

TABLE OF AUTHORITIES

Cases: PAGE

Air Cargo, Inc. v. Local Union 851, International Brotherhood of Teamsters, 733 F.2d 241 (2d Cir. 1984) 42

Air Line Pilots Association v. United Air Lines, 802 F.2d 886 (7th Cir. 1986), *cert. denied*, 107 S.Ct. 1605 (1987) 10, 34, 36, 40, 42

Airline Pilots Association v. Pan American World Airways, 765 F.2d 377 (2d Cir. 1985) 35

American Federation of Television and Radio Artists v. NLRB, 395 F.2d 622 (D.C. Cir. 1968) 25

American Ship Building Co. v. NLRB, 380 U.S. 300 (1965) 30, 47

Anheuser-Busch, Inc. v. Teamsters, Local 822, 584 F.2d 41 (4th Cir. 1978) 24

Bethlehem Steel Co., 136 N.L.R.B. 1500 (1962), *aff'd in pertinent part*, 320 F.2d 615 (3d Cir. 1963), *cert. denied*, 375 U.S. 984 (1964) 24

Brotherhood of Locomotive Engineers v. Baltimore & Ohio Railroad, 372 U.S. 284 (1963) 39, 46

Brotherhood of Railroad Trainmen v. Akron & Barberton Belt Railroad Co., 385 F.2d 581 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 923 (1968) 46

Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1969) 15, 16, 23, 43, 44, 46

Brotherhood of Railway & Steamship Clerks v. Florida East Coast Railway, 384 U.S. 238 (1966) .....*passim*

PAGE

Burlington Northern Railroad Co. v. Brotherhood of Maintenance of Way Employes, 107 S. Ct. 1841 (1987), *aff'g* 793 F.2d 795 (7th Cir. 1986) 16, 17, 42, 46

Capitol-Hustings Co. v. NLRB, 671 F.2d 237 (7th Cir. 1982) 40

Carpenter Sprinkler Corp. v. NLRB, 605 F.2d 60 (2d Cir. 1979) 25

Chicago & North Western Ry. Co. v. United Transportation Union, 402 U.S. 570 (1971) 12, 15, 39, 43

Colonie Fibre Co. v. NLRB, 163 F.2d 65 (2d Cir. 1947). 24

Communications Workers of America v. Beck, pet. for cert. granted, 107 S. Ct. 2480 (1987) 26

Communications Workers of America v. NLRB, 215 F.2d 835 (2d Cir. 1954) 24, 30

Detroit & Toledo Shore Line Railroad Co. v. United Transportation Union, 396 U.S. 142 (1969) 41, 43, 44

EEOC v. United Air Lines, 755 F.2d 94 (7th Cir. 1985)..9, 34, 36

Elgin, Joliet & Eastern Ry. Co. v. Burley, 325 U.S. 711 (1945) 44

Ellis v. Brotherhood of Railway, Airline & Steamship Clerks, 466 U.S. 435 (1984) 19

Flight Engineers International Association v. Eastern Air Lines, 359 F.2d 303 (2d Cir. 1966).....10, 35, 42

Graphic Communications District Council No. 2, 278 N.L.R.B. No. 52 (1986) 24

Hassett Maintenance Corp., 260 N.L.R.B. 1211 (1982). 24

Hawaii Meat Co. v. NLRB, 321 F.2d 397 (9th Cir. 1963). 40

PAGE

Hotel, Motel, Restaurant Employees, Local 19, 281 N.L.R.B. No. 86 (1986) 24

Hudson Chemical Co., 258 N.L.R.B. 152 (1981) 24

Indiana & Michigan Electric Co., 284 N.L.R.B. No. 7 (1987) 24

International Association of Machinists v. Aloha Airlines, 776 F.2d 812 (9th Cir. 1985).....35, 42

International Association of Machinists v. Northeast Airlines, 536 F.2d 975 (1st Cir.), *cert. denied*, 429 U.S. 961 (1976) 33-34, 36, 42

International Association of Machinists v. Qantas Airways, 122 L.R.R.M. 2263 (N.D. Cal. 1985)..... 35

International Association of Machinists v. Reeve Aleutian Airways, 469 F.2d 990 (9th Cir. 1972), *cert. denied*, 411 U.S. 982 (1973) .....*passim*

International Association of Machinists v. Street, 367 U.S. 740 (1961)..... 20

Manning v. American Airlines, 329 F.2d 32 (2d Cir.), *cert. denied*, 379 U.S. 817 (1964).....10, 22, 35, 42

NLRB v. Abbott Publishing Co., 331 F.2d 209 (7th Cir. 1964)..... 40

NLRB v. Haberman Construction Co., 618 F.2d 288 (5th Cir. 1980), *modified on other grounds on reh'g en banc*, 641 F.2d 351 (5th Cir. 1981) 24-25

NLRB v. Insurance Agents' International Union, 361 U.S. 477 (1960)..... 47

NLRB v. International Union, United Implement Workers, 297 F.2d 272 (1st Cir. 1961) 24, 29

NLRB v. International Union, United Implement Workers, 194 F.2d 698 (7th Cir. 1952)..... 24

PAGE

NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1938)..... 14

Ortiz Funeral Home, Inc., 250 N.L.R.B. 730 (1980), *enforced*, 651 F.2d 136 (2d Cir. 1981), *cert. denied*, 455 U.S. 946 (1982)..... 24

Peerless Roofing Co., 247 N.L.R.B. 500 (1980), *enforced*, 641 F.2d 734 (9th Cir. 1981)..... 24

Railway Employes' Department v. Hanson, 351 U.S. 225 (1956) 19, 25

Robbins Door & Sash Co., 260 N.L.R.B. 659 (1982)... 24

S. Freedman Electric, Inc., 256 N.L.R.B. 432 (1981)... 24

Southwestern Steel & Supply, Inc. v. NLRB, 806 F.2d 1111 (D.C. Cir. 1986) 23, 24

Terminal Railroad Association of St. Louis v. Brotherhood of Railroad Trainmen, 318 U.S. 1 (1943) 15, 39

Texas & New Orleans Railroad Co. v. Brotherhood of Railway & Steamship Clerks, 281 U.S. 548 (1930) ... 43

United Transportation Union v. Georgia Railroad, 452 F.2d 226 (5th Cir. 1971), *cert. denied*, 406 U.S. 933 (1972) 46

Virginian Ry. Co. v. System Federation No. 40, 300 U.S. 515 (1937) 15, 39

Wallace Corp. v. NLRB, 323 U.S. 248 (1944) 29

Watson-Rummell Electric Co., 277 N.L.R.B. No. 162 (1985), *enforced in part and remanded on other grounds*, 815 F.2d 29 (6th Cir. 1987) 24

Statutes:

National Labor Relations Act
Section 8(a)(3), 29 U.S.C. § 158(a)(3).....19, 23, 25, 26

Railway Labor Act
Section 2 First, 45 U.S.C. § 152, First..... 43
Section 2 Second, 45 U.S.C. § 152, Second 43

PAGE

Section 2 Third, 45 U.S.C. § 152, Third 29
Section 2 Fourth, 45 U.S.C. § 152, Fourth .....*passim*
Section 2 Fifth, 45 U.S.C. § 152, Fifth 18
Section 2 Seventh, 45 U.S.C. § 152, Seventh 32, 41
Section 2 Eleventh, 45 U.S.C. § 152, Eleventh ....*passim*
Section 5 First, 45 U.S.C. § 155, First .....*passim*
Section 6, 45 U.S.C. § 156 .....*passim*
Section 7, 45 U.S.C. § 157..... 43
Section 10, 45 U.S.C. § 160 .....*passim*

Act of Aug. 21, 1986, Pub. L. No. 99-385, 1986 U.S. Code Cong. & Admin. News (100 Stat.) 819 46

Act of Sept. 30, 1986, Pub. L. No. 99-431, 1986 U.S. Code Cong. & Admin. News (100 Stat.) 987 46

Other Authorities:

Senate Subcommittee on Labor of the Comm. on Labor and Public Welfare, 93d Cong., 2d Sess., *Legislative History of the Railway Labor Act, as Amended (1926 through 1966)* (1974) 20

Burgoon, *Mediation Under the Railway Labor Act*, in National Mediation Board, *The Railway Labor Act at Fifty* (U.S.G.P.O. 1976) 31, 42

Rehmus, *Evolution of Legislation Affecting Collective Bargaining in the Railroad and Airline Industries*, in National Mediation Board, *The Railway Labor Act at Fifty* (U.S.G.P.O. 1976) 31

50 NMB Ann. Rep. (1984)..... 46

IN THE

Supreme Court of the United States

OCTOBER TERM 1986

No. 86-1650

TRANS WORLD AIRLINES, INC.,

Petitioner,

vs.

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Eighth Circuit (App. Cert. 1)[1] is reported at 809 F.2d 483, 124 L.R.R.M. 2364 (8th Cir. 1987). It affirms a memorandum and order of the U.S. District Court for the Western District of Missouri (App. Cert. 30), which are reported at 640 F. Supp. 1108, 123 L.R.R.M. 2077 (W.D. Mo. 1986).

---

1 "App. Cert. _____" refers to the Appendices to the Petition for a Writ of Certiorari. "App. Reply _____" refers to the Appendix to Petitioner's Reply Brief. "J.A. _____" refers to the Joint Appendix.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Eighth Circuit was entered on January 14, 1987. The petition for a writ of certiorari was timely filed on April 14, 1987, and was granted on June 8, 1987. Jurisdiction of this Court is conferred under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant provisions of the Railway Labor Act ("RLA" or "the Act"), as amended, (45 U.S.C. §§ 151 *et seq.*) and of the National Labor Relations Act ("NLRA"), as amended, (29 U.S.C. §§ 151 *et seq.*) are reprinted as Appendix D to the petition for certiorari. (App. Cert. 44)

STATEMENT OF THE CASE

Trans World Airlines, Inc. ("TWA") and the Independent Federation of Flight Attendants ("IFFA" or "the Union") were parties to a collective bargaining agreement with a stated term from August 1, 1981 to July 31, 1984 ("1981-84 agreement"). Negotiations for a new agreement began in March 1984 and proceeded through the steps required by the Railway Labor Act, including direct negotiation, mediation and the final 30-day cooling off period, without success. On March 7, 1986, approximately two years after the negotiations began, IFFA called a strike against TWA. Until IFFA announced the end of its strike on May 17, 1986, TWA operated with permanent strike replacements and with flight attendants employed before the strike began who crossed IFFA picket lines in order to work.[2] Since May, 1986, TWA has, in addition, rehired some of the strikers.

---

2 On March 5, 1986, IFFA filed an action (No. 86-6030-CV-SJ-6) in the U.S. District Court for the Western District of Missouri, alleging violations by TWA of the Railway Labor Act, including a failure to exert every reasonable effort to make a new agreement. That action is currently being tried before Judge Howard F. Sachs, who has ruled that he will consider in each action pending before him relevant facts established in the related actions. Claiming that its strike was caused and/or prolonged by carrier violations of the RLA, IFFA seeks, *inter alia*, a return to the status quo conditions in effect on and before March 6, 1986, the reinstatement of all full-term strikers, and the displacement of the strike replacements who are, pursuant to the district court order in this action, presently being required to pay compulsory dues to IFFA as a condition of their employment. (J.A. 54-59)

In another action, currently before the Eighth Circuit on petition for rehearing (Nos. 86-2197 and 86-2319), IFFA seeks the reinstatement of full-term strikers (and the displacement of strike replacements) on other theories, assuming that IFFA's strike was an economic one, neither caused nor prolonged by violations of the RLA. (J.A. 60-69; App. Reply 1) The stipulations reprinted at App. Cert. 111-115 were filed in that action, and were before the district court and the Court of Appeals when the decisions in this case were issued.

In April 1986, while the strike was in progress, IFFA asserted that the working flight attendants were subject to the union membership provisions of the old agreement, *i.e.*, that they must become members of the Union and maintain that membership, at least to the extent of paying initiation fees and monthly dues to the Union, or lose their jobs. TWA then sought a declaratory judgment that it had no obligation, unless and until a new agreement containing union security provisions was reached, to enforce the union membership or dues check-off provisions of the old agreement for the benefit of the Union.

The court below held that "the national labor policy enunciated by the Railway Labor Act . . ." (App. Cert. 5) requires TWA to compel over 4,000 flight attendants (nearly all of whom chose to work during the strike) to pay involuntary dues to IFFA, as a condition of their continued employment, even though there is no successor collective agreement. The court also held that TWA is required to assist IFFA in collecting those dues by implementing a dues check-off procedure—while

IFFA is free to strike, picket, boycott and engage in other self-help in support of its bargaining demands.

The Controlling Facts

The 1981-84 agreement between TWA and IFFA[3] was by its terms effective from August 1, 1981 until July 31, 1984, and was subject to renewal thereafter for annual periods "unless written notice of intended change [was] served in accordance with Section 6 . . . of the Railway Labor Act . . . by either party . . . at least 90 days prior to the renewal date . . . ." (App. Cert. 78)[4] As authorized by RLA Section 2 Eleventh (45 U.S.C. § 152, Eleventh), which states that a carrier and a union "shall be permitted . . . to make [such] agreements . . . ," the 1981-84 agreement contained compulsory union membership and dues check-off provisions in Article 24.

Under that Article, each employee in a classification covered by the agreement was, as a condition of continued employment, required to pay initiation fees and monthly dues to IFFA. (App. Cert. 66-67) Article 24 also obligated TWA, "[d]uring the life of this Agreement," to deduct the compulsory fees and dues from the pay of covered employees, provided that the employee voluntarily executed an "assignment and authorization for check-off of initiation fees and union dues." (App. Cert. 72-73) As required by RLA Section 2 Eleventh, each dues check-off authorization was to be revocable "after the expiration of one (1) year from [its execution], or upon the termination date of the applicable collective bargaining agreement . . . whichever occurs sooner." (App. Cert. 73)[5]

On February 29, 1984, in accordance with Article 28 of the agreement, and RLA Section 6 (45 U.S.C. § 156), TWA served on IFFA a notice of intended change, thereby preventing automatic renewal of the 1981-84 agreement. In that notice, TWA expressly referred to "the execution of a basic collective bargaining agreement, succeeding the current agreement" and "reserve[d] the right to propose further additions, deletions, modifications or other changes in the agreement warranted by conditions that may arise prior . . ." thereto. (J.A. 38) On April 27, 1984, IFFA served on TWA its notice of intended change. Neither party proposed that a new agreement, if and when reached, contain union membership provisions different from those contained in Article 24 (A-L) of the 1981-84 agreement. (App. Cert. 88)

In May 1984, TWA invoked the services of the National Mediation Board ("NMB"), pursuant to RLA Section 5 First, to assist the parties through mediation in reaching a new agreement. (App. Cert. 88) Negotiations continued, through the processes of the Railway Labor Act and under the auspices of the NMB, for nearly two years. Throughout that period, and after the 1981-84 agreement expired by its terms on July 31, 1984, both parties were required by RLA Section 6, to maintain in effect the "rates of pay, rules or working conditions" that existed when the notices of intended change were

---

3 IFFA was certified by the National Mediation Board in 1977 as the bargaining representative under the Railway Labor Act of TWA employees in the flight attendant craft or class. (J.A. 28) The parties entered into their first collective agreement in 1978.

4 The full text of the duration clause in Article 28 (entitled "Duration of Agreement") is:

> Except as otherwise specified in this Agreement, this entire Agreement shall be effective August 1, 1981 [and] shall remain in effect until July 31, 1984, and thereafter shall renew itself without change for yearly periods unless written notice of intended change is served in accordance with Section 6, Title I of the Railway Labor Act, as amended, by either party hereto, at least 90 days prior to the renewal date in each year. (App. Cert. 78)

The introductory "Except" phrase took into account, for example, Articles 4 and 22(A) of the agreement (which were effective March 5, 1983), Article 27 (under which certain events would subject all or parts of the agreement to renegotiation *before* July 31, 1984), and Letter No. 1 (which stated that it would "continue indefinitely," subject to revocation by either party upon two years advance notice). (App. Cert. 56, 66, 76-78, 80-81)

5 The dues check-off authorization form tracked the language of Section 2 Eleventh, which states that a written assignment of membership dues to a labor organization "shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner." *Compare* 45 U.S.C. § 152, Eleventh (b) *with* App. Cert. 73.

served, including the union membership requirement and the dues check-off procedure. 45 U.S.C. § 156.

On February 4, 1986, no new agreement having been reached, the NMB concluded, pursuant to Section 5 First, that its best efforts to bring the parties to agreement through mediation had been unsuccessful. It therefore released the parties from mediation, and notified them that the final 30-day "cooling off" period mandated by Section 5 First had begun. (App. Cert. 89) Pursuant to that notice, if no agreement was reached by midnight, March 6, the statutory status quo period would end and both parties would be free to resort to self-help.[6]

No new agreement was reached and the obligations of both parties, under RLA Sections 5 and 6, to maintain the status quo ended on March 6. Shortly thereafter, IFFA began a strike, and TWA put into effect new rates of pay and work rules. (App. Cert. 90) On March 7, 1986, in order to continue operating, TWA began hiring permanent replacements for the striking flight attendants. During the course of the strike, some 2,800 new flight attendants were hired as permanent strike replacements, and about 1,280 pre-March 7 flight attendants abandoned the strike and crossed IFFA picket lines to return to work (or never joined the strike). (App. Cert. 113-14)

When the status quo period ended, TWA ceased requiring its flight attendants to pay compulsory dues to IFFA as a condition of their employment and discontinued the dues check-off procedure. The flight attendants (both working and striking) were, of course, free to pay dues to the Union on a voluntary basis.

---

6 The NMB, apparently concluding that the dispute did not "threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service . . . ," did not invoke Section 10 of the Act, and no Emergency Board was established by the President to evaluate the dispute and report to him. 45 U.S.C. § 160. If an Emergency Board had been created, the parties would have been precluded, until thirty days after the Emergency Board had made its report to the President, from making any change (except by agreement) "in the conditions out of which the dispute arose." *Id.*

Inception of This Action

On April 11, 1986, when IFFA had been on strike for over a month, it asserted that Article 24 of the 1981-84 agreement remained in effect and was enforceable against flight attendants working during the strike. (App. Cert. 96-98) By letter dated April 25, 1986, TWA informed IFFA that it had no remaining contractual or statutory obligation to enforce Article 24 of the expired agreement against its employees for the benefit of IFFA. That letter included the statement that

> [i]t is contrary to all reason to suggest that an expired agreement requires flight attendants, as a condition of their continued employment by TWA, to pay dues to support IFFA's strike, although they have chosen to work. IFFA's position, in other words, appears to be that a flight attendant who is now working, in order to keep working, must pay dues to the union which is trying to persuade that flight attendant to stop working. (App. Cert. 100)

On the same day, TWA filed this action.

In June 1986, TWA moved and IFFA cross-moved for summary judgment. At the time of the cross-motions, TWA's workforce included approximately 4,200 flight attendants: some 2,800 new flight attendants hired as permanent replacements during the strike; approximately 1,200 pre-March 7 flight attendants who never joined the strike or who abandoned it to cross IFFA picket lines and return to work; and about 200 "full-term strikers" rehired after the end of the strike. (App. Cert. 113-15) IFFA contended that all these employees must pay union dues or lose their jobs, although no new agreement containing a union membership requirement or dues check-off procedure had been made.

The District Court Decision

The district court granted summary judgment in favor of IFFA. It relied principally on language from this Court's opinion in *Brotherhood of Railway & Steamship Clerks* v. *Florida East Coast Railway*, 384 U.S. 238 (1966) ("*FEC*")—

although acknowledging that *FEC* "may well" have been "premised on an assumption of an underlying, existing contract" (App. Cert. 36), rather than an agreement whose stated term had lapsed.

Characterizing the questions presented as "sufficiently difficult . . . to justify reasoning in the alternative" (App. Cert. 31), the district court first concluded that the Railway Labor Act does not permit a collective bargaining agreement for a fixed term. In the court's view, therefore, TWA's obligation to enforce the union membership requirement survived beyond the statutory status quo period and into the self-help period, even assuming that the parties had agreed that the contract would expire on July 31, 1984. The court expressly declined to follow the Ninth Circuit holding directly to the contrary. *See International Association of Machinists* v. *Reeve Aleutian Airways*, 469 F.2d 990 (9th Cir. 1972), *cert. denied*, 411 U.S. 982 (1973).

Alternatively, and with only slightly shifted emphasis, the district court read the duration provision of the 1981-84 agreement "harmoniously with the Act so as to create continuing obligations [beyond its stated term], except as changed in accordance with § 6 or with supplemental agreements refining the prescribed procedures." (App. Cert. 40) So viewed, it concluded, "partial renewal" of all terms of the agreement not referred to in the Section 6 notices "seem[ed] implied . . . ." (App. Cert. 40) Consequently, according to the court, the union membership and dues check-off provisions remained in effect as part of what it described as a "mutilated collective bargaining agreement." (App. Cert. 39 n.8)

The Court of Appeals Decision

The Court of Appeals, also relying principally on language from this Court's opinion in *FEC*, affirmed. It too declined to follow the holding or rationale of *IAM* v. *Reeve Aleutian Airways*, *supra*, where the Ninth Circuit held that union security requirements (even if not the subject of a Section 6 notice) do not survive, after the stated term of a collective

agreement and the exhaustion of RLA procedures, into the self-help period.

The Eighth Circuit purported to rest its decision on an interpretation of the duration clause of the 1981-84 agreement, construed "in light of the national labor policy enunciated in the Railway Labor Act" (App. Cert. 5), and to find it "unnecessary . . . to address whether or not the RLA permits agreements of fixed duration" (App. Cert. 18 n.5, 5). Echoing the district court's concept of "partial" renewal, it concluded:

> [T]he contract in question is amendable in accordance with its provisions and the Railway Labor Act. It does not wholly terminate, either automatically or upon service of notice of a limited number of intended changes. The union security provision continues in effect, * * *. (App. Cert. 14-15)

No authority, circuit court or district court, under the RLA or the NLRA, construing similar duration clause language was cited in support of that conclusion.[7]

The Eighth Circuit's conclusion flowed from its view that "the underlying statute . . . *requires* a construction which emphasizes continuity in existing relationships between management and labor, except where either side has requested a change" (App. Cert. 15; emphasis added) and that "the core language of *FEC* . . . *requires* stable and continuing agree-

---

7 The duration clause of the indefinite agreement found by the Seventh Circuit to be merely "amendable" in *EEOC* v. *United Air Lines*, 755 F.2d 94 (7th Cir. 1985), was substantially different from that in the TWA-IFFA agreement. It provided:

> "This agreement shall remain in full force and effect through November 1, 1978, and thereafter shall be subject to change by service of notice as provided for in Section 6 of the Railway Labor Act, as amended . . . *no other provisions of the agreement shall be affected by such notice* . . . ." 37 Fair Empl. Prac. Cas. 30, 32 (N.D. Ill. 1983) (ellipsis by the court; emphasis added); *see also* 755 F.2d at 97.

The Seventh Circuit recognized that distinction when it held that the IAM agreement before it was materially different from the IAM-Reeve Aleutian agreement found by the Ninth Circuit to be terminable by service of a Section 6 notice. 755 F.2d at 99.

ments between management and labor" (App. Cert. 12; emphasis added). Thus, although ostensibly eschewing reliance on the district court's holding that an agreement for a fixed term is "unlawful under the RLA" (App. Cert. 5), the Court of Appeals reached the same result through an unprecedented construction of the unambiguous duration clause of the 1981-84 agreement.[8]

The Eighth Circuit spoke, for example, of the "special rules" applicable under the RLA—without regard to the substantive terms of the agreement made by the parties:

> One of those rules is that if a working condition has not been subject to the procedures of the Act, it may not be changed even after expiration of the status quo period unless truly necessary for the continued operation of the airline. (App. Cert. 16)

Imposing that "special rule," the court emphasized that "the policies enunciated by the Court in *FEC* rise above any interpretation of the language of a collective bargaining agreement" (App. Cert. 16) and that " 'the "spirit" of the Act is [not] determined by language selected by draftsmen of * * * clauses in collective bargaining agreements.' " (App. Cert. 17)

In short, in purported implementation of what it described as "the very heart of the Railway Labor Act—collective bargaining" (App. Cert. 18), the court below refused to give effect to a duration clause that was the product of collective bargaining. Instead, the court rewrote Article 28 of the 1981-84 agreement to conform to what it believed to be national labor

---

8 Duration provisions identical in all material respects have been read by the Second, Seventh and Ninth Circuits to create *not* a continuing and merely "amendable" agreement (or a "partially renewable" agreement), but one that expires by its terms after service of a Section 6 notice of intended change. *Manning* v. *American Airlines*, 329 F.2d 32, 33 (2d Cir.), *cert. denied*, 379 U.S. 817 (1964); *Flight Engineers International Association* v. *Eastern Air Lines*, 359 F.2d 303 (2d Cir. 1966); *IAM* v. *Reeve Aleutian Airways*, *supra*, 469 F.2d at 991; *Air Line Pilots Association* v. *United Air Lines*, 802 F.2d 886, 891, 910 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 1605 (1987). Indeed, both the Second and Ninth Circuits had so ruled at the time the duration provision was first agreed to by TWA and IFFA in 1978.

policy, and "renewed" the compulsory payment of union dues for an indefinite period—beyond the stated term of the agreement by virtue of which that compulsion was lawful, and beyond the status quo periods established by Congress—to avoid a result that would, in the court's view, be "at odds with the RLA." (App. Cert. 18) It thus enforced a contract that the parties had never made, because it believed that the Railway Labor Act required it to do so.

Nowhere in the opinion of the Court of Appeals (or that of the district court) is there apparent any consideration of the unique nature of union security provisions. Nor is there any reference to the legislative history of Section 2 Eleventh, which demonstrates beyond question that it was consciously modeled by Congress on comparable provisions of the National Labor Relations Act and was intended to afford to carriers and unions under the RLA rights parallel to those available to employers and unions under the NLRA. (*See* pp. 20 to 21, *infra*.)

Nonetheless, the court below found a dichotomy in national labor policy as it relates to union security clauses. It acknowledged that, under the NLRA, "union security provisions do not survive expiration of a contract even though provisions governing terms and conditions of employment generally do survive . . . and may not be changed until the parties have bargained to impasse." (App. Cert. 16) The court stated, however:

> While cases under the NLRA may be instructive, the contract at issue here is under the RLA and must be evaluated in light of its policies, which are in some respects unique to the RLA and those industries subject to its provisions. As the Supreme Court recognized in *FEC*, *supra*, the importance of the industry's public service nature, and its responsibility to maintain that service, warrants [sic] special rules. (App. Cert. 16)

Not explained is how or why the "public service nature" of the industry (relied on by this Court in *FEC* when it permitted a carrier, during a strike, to *depart from* the terms of a

contract admittedly still in effect, in order to maintain service) supports the conclusion that, during the self-help period, a carrier must *adhere to* the terms of an expired contract. Nor did the court below address the anomaly of requiring strike replacements and others who did not support the strike to pay involuntary dues to finance IFFA's efforts to displace them (*see* n.2, *supra*)—other than by commenting that "these are not concerns of TWA . . ." (App. Cert. 17).

SUMMARY OF ARGUMENT

The Railway Labor Act is an elaborate scheme, designed to foster the voluntary adjustment of disputes and to prevent interruption of transportation. As the court below apparently failed to recognize, Congress did not authorize or expect the courts to devise the rules that would lead to that goal; it expressly prescribed the rules and mechanisms requiring carriers and unions to pursue a long, drawn-out process of negotiation and conciliation, including no fewer than three statutory status quo periods, with the active participation and supervision of the National Mediation Board. 45 U.S.C. §§ 5 First, 6 and 10. "Underlying the entire statutory framework is the pressure born of the knowledge that in the final instance traditional self-help economic pressure may be brought to bear if the statutory mechanism does not produce agreement."[9]

There is no room in this carefully crafted scheme for judicial invention of obligations or prohibitions not contained in the Act—whether in the form of a "partial" status quo period (App. Cert. 14) in addition to those established by Congress, or "special rules" (App. Cert. 16) that impose on the parties by operation of law, after exhaustion of the statutory procedures, union security arrangements intended by Congress to exist only on a consensual basis.

Indeed, this case—with its incongruous consequences—is a textbook illustration of the dangers associated with judicial

---

9 *Chicago & North Western Ry. Co.* v. *United Transportation Union*, 402 U.S. 570, 597 (1971) (Brennan, J., dissenting).

intrusion and invention of the sort in which the court below engaged. In order to serve the "general policies" and "spirit" of the RLA (App. Cert. 16, 13), the Eighth Circuit

- has held that TWA must adhere to contractual provisions agreed to as a *quid pro quo* for labor peace

  —although the parties are engaged in economic warfare;

- has required TWA to assist the Union, through the threat of discharge and the dues check-off, in obtaining dues from working flight attendants

  —while IFFA is free to strike, picket, boycott and engage in other self-help against TWA; and

- has compelled some 4,000 strike replacements and others who opposed IFFA's strike to pay involuntary dues to the Union

  —although the Union has not reached a new agreement with TWA, is actively pursuing litigation designed to remove the dues-payers from their jobs and does not require the payment of dues by strikers.

Without reference to the language of the Railway Labor Act itself, or to its extensive legislative history, the court below announced "special rules" applicable to collective agreements under the RLA. (App. Cert. 16) As applied in this case, those rules, according to the Eighth Circuit, require the continuation of union security clauses after the stated term of the agreement of which they were a part and after the expiration of the status quo period. That result, however, has been uniformly rejected—as antithetical to federal labor policy—by the courts and the National Labor Relations Board in administering the NLRA.

The Eighth Circuit's fiction of "partial" renewal of a "mutilated" agreement (App. Cert. 39 n.8) is predicated on a misreading of the design of the Railway Labor Act, and a misapplication of this Court's decision in *Florida East Coast Railway*. Its result is the creation of an idiosyncratic and

mischievous dichotomy in national labor policy as it relates to union security clauses. If allowed to stand, with its partisan approach to labor relations, the decision below would distort the carefully balanced scheme of freedom and compulsion embodied in the Act, would inject the courts into areas that Congress intended to be free of judicial regulation and would fundamentally disturb the negotiating atmosphere that the Act seeks to foster.[10]

The court below justified its decision by referring to "the general policies of the RLA" (App. Cert. 16), but said nothing about the specific policies embodied in RLA Section 2 Eleventh, which are intended to parallel the policies of the NLRA with respect to union security clauses. The insupportable consequence of the decision below is judicial sanction of the compulsory payment of involuntary union dues, as a condition of employment, in violation of RLA Sections 2 Fourth and Eleventh. It also has the anomalous, and equally insupportable, result of permitting a union, during a labor dispute that has reached the stage of Congressionally-sanctioned economic struggle, to continue without restriction the exercise of self-help in an attempt to achieve its bargaining objectives, while denying the carrier the right to exercise the most modest form of peaceful self-help—refusal to assist the union in securing economic support for *its* self-help efforts.

There is nothing incompatible with national labor policy in an employer's insistence that, unless and until a new agreement is reached and labor peace prevails, a union must collect dues, if at all, on a voluntary basis and without the assistance of dues

---

10 It is not necessary to speculate about the broad and destabilizing effects on labor relations if the decision below is allowed to stand. The Eighth Circuit has already applied it to subvert a principle stated by this Court nearly fifty years ago in *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938), to deprive TWA of one of its principal self-help weapons (*i.e.*, the right to retain permanent employees who choose not to strike), and to extinguish the protected right of some 1,700 flight attendants to refrain from engaging in concerted activity against their employer. *Independent Federation of Flight Attendants* v. *Trans World Airlines*, Nos. 86-2197 and 86-2319 (8th Cir. May 26, 1987) (Bright, Sen. Cir. J.), *petition for rehearing en banc pending*. (App. Reply 1)

check-off and the threat of discharge. Indeed, as the Ninth Circuit correctly concluded under the RLA, and as the National Labor Relations Board and the courts have uniformly concluded under the NLRA, such insistence is obedient to the mandates of both the RLA and the NLRA. The court below, holding to the contrary, flouted the clear Congressional intent expressed in RLA Section 2 Fourth and Eleventh.

It also departed dramatically from principles long recognized to be integral to the Act—including "the strong federal labor policy against governmental interference with the substantive terms of collective-bargaining agreements" (*Chicago & North Western Ry. Co.* v. *United Transportation Union*, 402 U.S. 570, 579 n.11 (1971)) and the right of "parties who have unsuccessfully exhausted the Railway Labor Act's procedures . . . to employ the full range of whatever peaceful economic power they can muster, so long as its use conflicts with no other obligation imposed by federal law." (*Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 392 (1969)).

With the significant exception of RLA Section 2 Eleventh (which restricts the circumstances under which a carrier and a union may agree to union membership and dues check-off provisions), Congress did not frame a scheme within which the courts would be free to determine the content of collective agreements—either directly, or by picking and choosing which of their terms are consistent with the "spirit" of the Act. *See Terminal Railroad Association of St. Louis* v. *Brotherhood of Railroad Trainmen*, 318 U.S. 1, 6 (1943); *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U.S. 515, 548 (1937). Yet, the court below reached the startling and untenable conclusion that the Railway Labor Act—designed to encourage the making of voluntary agreements, and consciously devoid of any compulsory mechanism for regulating their substantive provisions—should be construed to render unenforceable a duration clause voluntarily agreed to by a carrier and a union, and thus to perpetuate union security provisions not only beyond the stated term of the contract but after the statutory status quo period.

Also implicit in the statutory scheme "is the ultimate right of the disputants to resort to self-help—'the inevitable alternative in a statutory scheme which deliberately denies the final power to compel arbitration.' " *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, *supra*, 394 U.S. at 378. "[I]f the parties exhaust [the statutory] procedures and remain at loggerheads, they may resort to self-help in attempting to resolve their dispute, subject only to such restrictions as may follow from the invocation of an Emergency Board under § 10 of the RLA." *Burlington Northern Railroad Co.* v. *Brotherhood of Maintenance of Way Employes*, 107 S. Ct. 1841, 1851 (1987). The courts are not authorized, as did the court below, to define the permissible contours of self-help based on their convictions as to what constitutes the reasonable use of economic power by one party to the dispute—or how "important" (App. Cert. 18) a subject is to one party or the other.

Speculating about the " 'parade of horrors' " that would result in the absence of its "special rule" (App. Cert. 16-18), the Eighth Circuit seems to have lost sight of the fact that the only matters made the subject of the request for declaratory relief were the compulsory payment of union dues and the dues check-off. It is hardly a " 'reversion to the jungle' " (App. Cert. 8, 13) for employees to be permitted freedom of choice with respect to the payment of union dues. Nor can it seriously be contended that a carrier's refusal to implement dues check-off, unless and until a new agreement is reached, "frustrates the basic purpose of the RLA" (App. Cert. 18). And it most certainly does not "completely undermine the collective bargaining nature of the Act" (App. Cert. 17) for a carrier to decline to compel strike replacements to pay involuntary dues to a union that freely entered into an agreement for a fixed term and then chose to strike rather than reach a successor agreement through the statutory procedures.

Divining from the spirit of the Act a mandate that a carrier must "negotiate, mediate or arbitrate" (App. Cert. 18) its right to discontinue union security arrangements after the stated term of the agreement made by the parties and during the self-help period makes no more sense, in legal or practical terms, than requiring a union to "negotiate, mediate or arbitrate" its

right to strike after exhausting the statutory procedures. By not including in its Section 6 notice an item proposing change of union membership and dues check-off provisions contained in an agreement for a fixed term, a carrier no more "hide[s] its true intentions. . ." (App. Cert. 18) to discontinue them if a new agreement is not reached through the statutory processes than does a union surprise the carrier by striking at the end of the status quo period. Both parties simply do what the Act allows.

It does *not* "cut out the very heart of the Railway Labor Act. . ." (App. Cert. 18) for disputants to exercise whatever economic weapons are legitimately available to them if the statutory procedures fail to yield an agreement. As this Court has recognized, the availability of self-help measures (including the employer's freedom not to assist in compelling economic support for the union) "may increase the effectiveness of the RLA in settling major disputes by creating an incentive for the parties to settle prior to exhaustion of the statutory procedures . . . ." *Burlington Northern Railroad Co.* v. *Brotherhood of Maintenance of Way Employes*, *supra*, 107 S. Ct. at 1854. Or, as the Seventh Circuit put it in the *Burlington* case: "To curtail the self-help at the end of [the] sequence [of the mechanisms Congress provided] is to change the incentives under which negotiation occurs, to make negotiation less likely to succeed. . . ." 793 F.2d 795, 802 (7th Cir. 1986), *aff'd*, 107 S. Ct. 1841 (1987).

Nor, as the Ninth Circuit has held, is it contrary to the purposes of the RLA to acknowledge that none of the provisions of a contract for a fixed term have any further effect at the end of the sequence during which Congress mandated continuation of the status quo. This alternative ground of decision will, on the contrary, honor the agreements the parties choose to make and avoid the injection of unnecessary disputes into the bargaining process.

ARGUMENT

I. AFTER THE STATUS QUO PERIOD HAS ENDED WITHOUT AGREEMENT, THE RLA (LIKE THE NLRA) NEITHER REQUIRES NOR PERMITS COMPULSORY UNION MEMBERSHIP AS A CONDITION OF EMPLOYMENT.

Given the comments by the court below about the imaginary horrors that might flow from acceptance of TWA's position (App. Cert. 16-18), several points bear emphasis at the outset:

- The sole "change" in employment conditions put in issue by the pleadings (App. Cert. 94, 107-08) is the expiration of union membership and dues check-off provisions.
- The choice here is not between unionism and nonunionism; it is between voluntary and involuntary payment of union dues.
- TWA has in no way interfered with employee freedom of choice; by virtue of the expiration of the 1981-84 agreement and exhaustion of the statutory negotiation procedures, employees are simply permitted to exercise that freedom, as required by RLA Section 2 Fourth, Fifth and Eleventh.
- For decades under the NLRA (and, at least in the Ninth Circuit, for over a decade under the RLA), that same freedom of choice has been available to employees, during a hiatus between collective agreements, with no apparent detriment to the statutory schemes, national labor policy or industrial peace.

Thus, the question here is not primarily whether the RLA generally requires that working conditions set forth in a prior agreement and not specifically included in a Section 6 notice be maintained beyond the statutory status quo period. It is whether the Union may lawfully require TWA to compel its employees to support the Union while TWA has no new agreement with the Union and, therefore, neither TWA nor its

employees enjoy the labor peace and stability that Congress clearly envisioned as the *quid pro quo* for union security arrangements.

As reflected in both the RLA and the NLRA, union membership requirements and dues check-off are *sui generis*. This aspect of national labor policy has received careful treatment by Congress and the courts because the involuntary payment of union dues is an interference with otherwise protected employee rights to refrain from engaging in concerted activity (RLA § 2 Fourth; NLRA § 8(a)(3)) and, at least under the RLA, is "a significant impingement on First Amendment rights" (*Ellis* v. *Brotherhood of Railway, Airline & Steamship Clerks*, 466 U.S. 435, 455 (1984)).

Nonetheless, Congress has permitted (and the courts have upheld) such interference—but only when balanced by the voluntary collective agreement that it is national labor policy to encourage. As this Court stated shortly after the RLA was amended in 1951 to add Section 2 Eleventh,

> [t]he union shop provision of the Railway Labor Act is only permissive. Congress has not compelled nor required carriers and employees to enter into union shop agreements. *Railway Employes' Department* v. *Hanson*, 351 U.S. 225, 231 (1956).

RLA Section 2 Eleventh thus conditions compulsory union membership, and dues check-off, on the existence of a voluntary and subsisting labor contract. This is plain from the language of the Act and its history, as well as nearly four decades of authority construing similar provisions in the National Labor Relations Act and holding that maintenance of union membership and dues check-off represent a limited compulsion that may not lawfully be imposed on employees without a contract.

A. Under the RLA and the NLRA, Union Security Arrangements Are Purely Consensual; They May Not Be Imposed By Operation of Law Absent Explicit Statutory Authorization.

As this Court has observed, the history of union security under the Railway Labor Act

> is marked *first*, by a strong and long-standing tradition of voluntary unionism on the part of the standard rail unions; *second*, by the declaration in 1934 of a congressional policy of complete freedom of choice of employees to join or not to join a union; *third*, by the modification of the firm legislative policy against compulsion, but only as a specific response to the recognition of the expenses and burdens incurred by the unions in the administration of the complex scheme of the Railway Labor Act. *International Association of Machinists* v. *Street*, 367 U.S. 740, 750-51 (1961) (footnote omitted).

In 1951, the RLA was amended to include provisions "substantially the same as those of the Labor Management Relations Act as they have been administered." S. Rep. No. 2262, 81st Cong., 2d Sess. 3 (1950), *reprinted in* Comm. on Labor and Public Welfare, 93rd Cong., 2d Sess., *Legislative History of the Railway Labor Act, as Amended (1926 through 1966)* ("*Legislative History*"), 1090 (1974).[11] During Senate debate, it was repeatedly stated that the amendment was

> designed merely to extend to employees and employers subject to the Railway Labor Act rights now possessed by employees and employers under the Taft-Hartley Act in

11 Congress made "inroads" on the "policy of full freedom of choice" for employees for the "limited purpose of eliminating the problem created by the 'free-rider' "—"those employees who obtained the benefits of the unions' participation in the machinery of the Act without financially supporting the unions." *International Association of Machinists* v. *Street*, *supra*, 367 U.S. at 767, 761.

> industry generally. Its pattern is that of comparable provisions of the Taft-Hartley Act . . . 96 Cong. Rec. 15,737 (1950), *reprinted in Legislative History*, 1107 (Statement of Sen. Hill).

See also 96 Cong. Rec. 16,267 (1950), *reprinted in Legislative History*, 1134 ("the bill inserts in the railway mediation law almost the exact provisions . . . of the Taft-Hartley law, so that the conditions regarding the union shop and the check-off are carried into the relations between railroad unions and the railroads") (Statement of Sen. Taft).

The legislative history of Section 2 Eleventh also makes plain that it does "not require the execution of union-shop agreements; it merely permits the carriers and the representatives of their employees, through the *voluntary* process of collective bargaining, to include the union-shop provisions in their collective-bargaining agreements." S. Rep. No. 2262, 81st Cong., 2d Sess. 2, *reprinted in Legislative History*, 1089 (emphasis added). Clearly, when it enacted Section 2 Eleventh, Congress intended that union security arrangements would arise solely from the mutual consent of carrier and union, and would be permitted only when *voluntarily* agreed to.[12]

The consensual nature of union security arrangements is reflected in the statutory language itself. Subject to certain conditions, RLA Section 2 Eleventh permits carriers and unions to make "agreements" requiring (no earlier than sixty days following "the effective date of such agreements. . .") that all employees shall become members of the union that represents them. 45 U.S.C. § 152, Eleventh (a). It also permits

12 "[T]here is nothing in this proposed legislation [Section 2 Eleventh] that makes the union shop or the check-off effective unless and until a union and the carrier as a result of collective bargaining agree to it." 96 Cong. Rec. 17,051 (1951), *reprinted in Legislative History*, 1252 (Statement of Rep. Hoffman); "[T]his is permissive legislation, which simply permits railway management and railway labor, if they see fit, to enter into collective-bargaining agreements to provide for the union shop . . ." 96 Cong. Rec. 16, 260 (1950), *reprinted in Legislative History*, 1118 (Statement of Sen. Hill); *see also* 96 Cong. Rec. 15,736 (1950), *reprinted in Legislative History*, 1104.

"agreements" providing for dues check-off, but only upon written authorization by the employee—which must be revocable no later than "the termination date of the applicable collective agreement. . . ." 45 U.S.C. § 152, Eleventh (b).

Plainly, regardless of whether Congress contemplated total termination of contracts under the Railway Labor Act upon failure to agree on proposals for specified changes to make a new agreement, it did contemplate, and expressly recognized, that in the case of compulsory union membership and dues check-off, a contract termination date would be given effect.[13] Thus, even if the Eighth Circuit's view of national labor policy were correct as to other working conditions in an agreement for a stated term (*i.e.*, that unless noticed for change, they continue in effect for an additional, indefinite status quo period after the statutory status quo period ends), it is clearly erroneous with respect to compulsory payment of union dues.

Continuation of union membership requirements and the dues check-off during the statutory status quo period, while the union is precluded from striking, is consistent with the purpose of RLA Sections 5 First and 6 "to prevent rocking of the boat by either side until the procedures of the Railway Labor Act [have been] exhausted." *Manning* v. *American Airlines*, 329 F.2d 32, 35 (2d Cir.), *cert. denied*, 379 U.S. 817 (1964). Once the statutory procedures have been exhausted, however, no purpose of the Act is served by continuing in effect a compulsory arrangement, regulating the relationship between employee and union, that was lawful only by virtue of the "collective agreement" specified in Section 2 Eleventh.

---

13 The 1981-84 agreement reflects that recognition in Article 24(M), which obligated TWA to deduct initiation fees and monthly membership dues in favor of IFFA only "[d]uring the life of this Agreement. . . ." (App. Cert. 72) Tracking the language of RLA Section 2 Eleventh, the dues check-off form itself expressly permitted revocation of the check-off authorization by an employee "upon the termination date . . ." of the agreement. (App. Cert. 73) And Article 24(B), addressing maintenance of membership by certain employees, refers explicitly to "the term of this Agreement. . . ." (App. Cert. 67)

This conclusion is supported by decisions under Section 8(a)(3) of the National Labor Relations Act, which is, in all material respects, identical to RLA Section 2 Fourth and Eleventh.[14] Under the NLRA, union security provisions may be enforced only during the term of the agreement that embodies them because the statute is "understood to prohibit such practices unless they are codified in an *existing* collective-bargaining agreement." *Southwestern Steel & Supply, Inc.* v. *NLRB*, 806 F.2d 1111, 1114 (D.C. Cir. 1986) (emphasis in original). This has been a fixture of NLRA application since at least 1947, and was a well understood principle when Congress added Section 2 Eleventh to the RLA.

The reason was long ago spelled out by the National Labor Relations Board, and endorsed by the U.S. Court of Appeals for the Third Circuit:

> The acquisition and maintenance of union membership cannot be made a condition of employment except under a contract which conforms to the proviso to Section 8(a)(3). So long as such a contract is in force, the parties may, consistent with its union-security provisions, require union membership as a condition of employment. However, upon the termination of a union-security contract, the union-security provisions become inoperative and no justification remains for either party to the contract thereafter to impose union-security requirements. Consequently, when, upon expiration of its contracts with the Union, the Respondent refused to continue to require

---

14 As this Court recognized in another context, "[t]o the extent that there exists today any relevant corpus of 'national labor policy,' it is in the law developed during the more than [50] years of administering our most comprehensive national labor scheme, the National Labor Relations Act." *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 383 (1969). For that reason, courts have historically referred to the NLRA for assistance in construing the Railway Labor Act. Surely, such referral is appropriate—if not mandated—when the pertinent provisions of the RLA were consciously modeled by Congress on parallel provisions of the NLRA, and their legislative history confirms that Congress intended to extend to RLA carriers and unions rights parallel to those available to employers and unions under the NLRA.

> newly hired employees to join the Union after 30 days of employment, it was acting in accordance with the mandate of the Act. *Bethlehem Steel Co.*, 136 N.L.R.B. 1500, 1502 (1962), *aff'd in pertinent part*, 320 F.2d 615, 619 (3d Cir. 1963), *cert. denied*, 375 U.S. 984 (1964).[15]

Or, as the NLRB stated more recently, a union membership requirement is "inherently and solely a contractual matter, and an employer's refusal to enforce a union-security provision without a proper contractual basis is 'in accordance with the mandate of the Act.' " *Indiana & Michigan Electric Co.*, 284 N.L.R.B. No. 7, slip op. at 7 (1987).[16]

Thus, under the NLRA, union security provisions do not survive expiration of the contract even though, as to other terms and conditions of employment, "an employer may not unilaterally alter, without bargaining to impasse, a contractual term that is a mandatory subject of bargaining." *NLRB* v.

15 The Third Circuit affirmed: "We agree with the reasoning of the Board. The right to require union membership as a condition of employment is dependent upon a contract which meets the standard prescribed in Section 8(a)(3)." 320 F.2d at 619.

16 *See also, e.g., Southwestern Steel & Supply, Inc.* v. *NLRB*, *supra*, 806 F.2d at 1114; *NLRB* v. *Haberman Construction Co.*, 618 F.2d 288, 302 n.16 (5th Cir. 1980), *modified on other grounds on reh'g en banc*, 641 F.2d 351 (5th Cir. 1981); *NLRB* v. *International Union, United Implement Workers*, 297 F.2d 272, 274-75 (1st Cir. 1961); *Communications Workers of America* v. *NLRB*, 215 F.2d 835, 839 (2d Cir. 1954); *NLRB* v. *International Union, United Implement Workers*, 194 F.2d 698, 701-02 (7th Cir. 1952); *Colonie Fibre Co.* v. *NLRB*, 163 F.2d 65 (2d Cir. 1947); *Hotel, Motel, Restaurant Employees, Local 19*, 281 N.L.R.B. No. 86, slip op. at 1 n.1 (1986); *Graphic Communications District Council No. 2*, 278 N.L.R.B. No. 52, slip op. at 5 (1986); *Watson-Rummell Electric Co.*, 277 N.L.R.B. No. 162, slip op. at 4 (1985), *enforced in part and remanded on other grounds*, 815 F.2d 29 (6th Cir. 1987); *Hassett Maintenance Corp.*, 260 N.L.R.B. 1211 (1982); *Robbins Door & Sash Co.*, 260 N.L.R.B. 659 (1982); *Peerless Roofing Co.*, 247 N.L.R.B. 500, 505 (1980), *enforced*, 641 F.2d 734 (9th Cir. 1981); *S. Freedman Electric, Inc.*, 256 N.L.R.B. 432, 443 (1981); *Hudson Chemical Co.*, 258 N.L.R.B 152, 157 (1981); *Ortiz Funeral Home, Inc.*, 250 N.L.R.B. 730, 731 n.6 (1980), *enforced*, 651 F.2d 136 (2d Cir. 1981), *cert. denied*, 455 U.S. 946 (1982); *cf. Anheuser-Busch, Inc.* v. *Teamsters, Local 822*, 584 F.2d 41 (4th Cir. 1978).

Haberman Construction Co., 618 F.2d 288, 302-03 (5th Cir. 1980), *modified on other grounds on reh'g en banc*, 641 F.2d 351 (5th Cir. 1981); *Carpenter Sprinkler Corp.* v. *NLRB*, 605 F.2d 60, 64-65 (2d Cir. 1979); *American Federation of Television and Radio Artists* v. *NLRB*, 395 F.2d 622, 624 (D.C. Cir. 1968).[17] As the Fifth Circuit has explained,

> Contractual terms which are solely a product of the contract itself form an exception to the general rule that, at contract expiration, an employer is not free to deviate from contractual terms which are mandatory subjects of bargaining unless he has first bargained to impasse. Since the existence of these terms presupposes the existence of a contract, once that agreement has expired, an employer may alter these conditions without bargaining with the union . . . . Illustrations of terms of this type include . . . union security provisions . . . . *NLRB* v. *Haberman Construction Co.*, *supra*, 618 F.2d at 302 n.16 (citations omitted).

RLA Section 2 Eleventh, like the proviso to NLRA Section 8(a)(3), represents a Congressional balancing of the competing interests of employee freedom of choice with respect to union membership, and the financial needs of unions. *Railway Employes' Department* v. *Hanson*, *supra*, 351 U.S. at 233-35. There is not even a suggestion in the legislative history of RLA Section 2 Eleventh that Congress intended that provision to serve any purpose beyond that of the NLRA analogues or, in the circumstances presented here, that Congress intended Sec-

17 Despite obvious differences in the framework established for collective bargaining under the two statutory schemes (including the status quo period that is central to the design of the RLA and the statutory role of the National Mediation Board—which have no analogues in the NLRA and which obviate the need for an impasse determination), the court below announced a rule under the RLA that is similar to the "impasse" rule evolved by the National Labor Relations Board in administering the NLRA. Ironically, however, the Eighth Circuit extended its rule to union security provisions, which have long been recognized as a statutorily mandated exception to the NLRA rule.

tion 2 Eleventh to be given broader scope than obtained at the time and since then under the NLRA.[18]

B. The Court Below Articulated No Reasoned Basis (and There Is None) for the Dichotomy It Purported to Find In National Labor Policy.

It cannot reasonably be disputed that the 1981-84 agreement was for a stated term, *i.e.*, from August 1, 1981 to July 31, 1984. And, semantics aside, that agreement did (even on the Eighth Circuit's view of it) end on July 31, 1984. Whatever "mutilated collective bargaining agreement" (App. Cert. 39 n.8) the court below held to exist after that date, it most certainly was not the 1981-84 agreement.

Equally clear is that the Eighth Circuit imposed union security provisions on TWA (and its employees) not as a matter of contract, but by operation of the Act (as the Eighth Circuit viewed it). Throughout the opinion below, and despite the court's disclaimer of any need to reach the statutory question explicitly, the Eighth Circuit made plain that its holding was, in its view, mandated by the policies of the RLA and by this Court's statements in *FEC* about the purposes and spirit of the Act.

The court began its discussion by emphasizing that it construed the agreement "in light of the national labor policy enunciated by the Railway Labor Act. . ." (App. Cert. 5); and, in its final "comment," stressed that the result urged by TWA would, in the court's view, be "at odds with the RLA" (App. Cert. 18). After quoting at length from *FEC*, it said that "the underlying statute . . . *requires* a construction which emphasizes continuity in existing relationships between management and labor, except where either side has requested a change." (App. Cert. 15; emphasis added) It distinguished contrary authority with respect to union security requirements

18 The distinctions between RLA § 2 Eleventh and NLRA § 8(a)(3) argued in *Communications Workers of America* v. *Beck*, *pet. for cert. granted*, 107 S.Ct. 2480 (1987) are not relevant here—except insofar as they suggest that RLA § 2 Eleventh was intended by Congress to make even narrower inroads on employee freedom of choice than did NLRA § 8(a)(3).

under the NLRA by reference to "*FEC* [and] the general policies of the RLA." (App. Cert. 16) Those policies, the Eighth Circuit said, "rise above any interpretation of the language of a collective bargaining agreement. . . ." (App. Cert. 16)

In other words, the Eighth Circuit held that it was *required* to interpret a duration clause, theretofore commonly understood to result in contract expiration, as having the opposite effect—because it believed that the common meaning would offend the "spirit" of the RLA as explicated in *FEC*.[19] Driven as it was by the court's view of the statutorily required result, that holding should be viewed for what it is: not the enforcement of a consensual union security agreement, but the imposition of union membership requirements and dues checkoff—by operation of law—despite the absence of agreement and in contravention of RLA Section 2 Eleventh.

Apart from its mistaken reliance on *FEC* (*see* pp. 30 to 38, *infra*), the court below articulated only two reasons for finding a dichotomy in national labor policy with respect to union

19 The court below also asserted that the duration clause in *Reeve Aleutian* and that before it are not "identical" in that they differ by a single word: "entire." (App. Cert. 11, 14) It ignored the context that occasioned the use of that word, and its obvious purpose.

The duration clause of the 1981-84 agreement begins: "*Except as otherwise specified in this Agreement*, this entire Agreement shall be effective August 1, 1981 [and] shall remain in effect until July 31, 1984. . . ." (App. Cert. 78; emphasis added) Disingenuously ignoring the introductory phrase of exception, the court below adopted, without analysis, the district court's language speculating that " 'partial renewal *seems* implied in the language preventing renewal of the "entire" agreement . . . .' " (App. Cert. 14; emphasis added) This "seem[ing]" implication rested on the strained inference that the "likely . . . operative purpose" of the word "entire" was to "distinguish between all or parts of the agreement" for purposes of renewal. (App. Cert. 14)

Not even mentioned by the district court or the Eighth Circuit was TWA's explanation that the operative and obvious purpose of the word "entire" was to make plain that, "[e]xcept" as to those provisions with different effective dates (*see* n.4, *supra*), the "*entire* Agreement" would be for the term stated. Thus, when the phrase "entire Agreement" is read in the context of the "Except" clause—as it must be—the so-called lack of "identity" between the duration clause here and that in *Reeve Aleutian* disappears.

security arrangements. First, it pointed to the "public service nature" of the industry and the carrier's "responsibility to maintain that service . . . ." (App. Cert. 16) That responsibility was emphasized by this Court in *FEC* as reason for permitting a carrier to deviate from the terms of an otherwise effective collective agreement in order to maintain service during a strike and to vindicate its right of self-help. In no way, however, does it explain why a carrier should be required to adhere to contract provisions after the stated term of the agreement. Even less does it support the view that a striking union should have the benefit, after an agreement has ended, of involuntary dues that may permit it to prolong the strike, interfering with the carrier's ability to maintain service.

As further justification for applying its "special rule" to union security requirements, and illustrative of the court's misapprehension of the issues before it, the Eighth Circuit stressed that union security is an "extremely important condition. . . ." (App. Cert. 18) "Clearly," it said, "if the Union is to represent the flight attendants, it needs to collect dues, and enforcement of the check-off provision is integral to that process." (App. Cert. 17) No explanation is given as to why this is any more "clear" under the RLA than under the NLRA.[20]

The flaws in the Eighth Circuit's reasoning would be even more starkly exposed if the 1981-84 agreement had included a broad no strike clause that was not the subject of bargaining between TWA and IFFA. The no strike clause would survive into the self-help period if the Eighth Circuit's "special rule" were correct and a "partial" renewal of the agreement occurred. Surely, neither the court below nor IFFA would argue

---

20 In any event, the court's statement is ironic given that the result of its decision is to require the working flight attendants to finance litigation aimed at displacing them from their jobs. (*See* n.2, *supra*.) Even more important, in these particular circumstances, it is an inversion of legislative intent, for it effectively permits the strikers to be "free-riders." (*See* n.11, *supra*.)

for such a result. Yet, the court's reasoning inevitably leads to that conclusion.[21]

Under the RLA (like the NLRA), to permit a union to seek the discharge of employees for nonpayment of dues before a new agreement containing union security provisions is reached assumes that there will be such an agreement; it gives retroactive effect to an anticipated union membership requirement, which Congress clearly provided was to apply only during the term of an agreement and no earlier than sixty days following its "effective date." 45 U.S.C. § 2 Eleventh (a). *See NLRB* v. *International Union, United Implement Workers*, 297 F.2d 272, 274-75 (1st Cir. 1961); *cf. Wallace Corp.* v. *NLRB*, 323 U.S. 248 (1944). It would also have the practical effect of interfering with the organizational rights of employees under RLA Section 2 Third and Fourth, when the statute requires freedom of choice, by compelling working employees financially to support the incumbent striking union.

Under the RLA (like the NLRA), the effect of the discontinuance of union security arrangements after the contract expires and the statutory procedures have been exhausted is to exert pressure on the union to modify its bargaining demands. If compelled to enforce the involuntary payment of union dues (through the threat of discharge) and to assist the union (through the check-off) in collecting those dues, an employer is thereby denied the full economic power that it would otherwise be entitled to use under a scheme that leaves open the possibility of the ultimate resolution of disputes through the free play of economic forces. It would be no less anomalous under the RLA than under the NLRA to impose union security provisions on a carrier by operation of the Act after a contract for a fixed term has expired, while the union is free to strike and engage in other self-help. To do so would afford "a greater security for the Union than it obtained at the bargaining

---

21 Nor would the result be any different if the no strike clause were expressly limited to "the life of this Agreement." Indeed, the dues check-off provision "renewed" by the court below was precisely so limited. (App. Cert. 72)

table" and would deprive the carrier of the benefit of its bargain, *i.e.*, the *quid pro quo* of labor peace, as well as the full extent of its legitimate self-help. *See, e.g., Communications Workers of America* v. *NLRB*, 215 F.2d 835, 839 (2d Cir. 1954).

For fully forty years, unions subject to the NLRA have been carrying out their representational duties under a law that requires the discontinuance of compulsory union dues and the dues check-off during a hiatus between collective agreements. And, at least under the First, Second and Ninth Circuits' view of national labor policy (*see* pp. 33 to 36, *infra*), unions in the airline industry have long been required to do the same if—having voluntarily entered into an agreement for a fixed term—they choose to pursue a strategy of self-help in support of their demands for a new agreement, rather than reaching agreement through the statutory procedures.

If that freely chosen strategy has failed, it is not for the courts to implement some ideal notion of balanced bargaining power by "renewing" the union membership and dues check-off provisions, and compelling TWA to assist the Union through the forced collection of union dues from unwilling employees as a condition of their employment. Under the RLA (like the NLRA), "the right to bargain collectively does not entail any 'right' to insist on one's position free from economic disadvantage." *American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 309 (1965).

II. THE COURT BELOW MISAPPLIED THIS COURT'S DECISION IN *FLORIDA EAST COAST RAILWAY*.

The Eighth Circuit misread *FEC* as imposing "special rules" against change, when that decision actually announced a special rule *for* change in existing contracts of indefinite duration. As the Ninth Circuit properly concluded, *FEC* has no relevance to contracts that specifically provide for a fixed term duration. This Court's "eloquent lecture" in *FEC* about the purposes of the Act (App. Cert. 35) merely emphasizes what TWA urges here: the terms and spirit of the Act mandate that disputants

abide by the agreements they have made—including their duration clauses.

A. *FEC*: The Act Permits Limited Departures From an *Existing* Agreement In Order to Preserve a Carrier's Right to Self-Help.

In *FEC*, the Court did not consider whether union membership provisions in an agreement for a fixed term remained in effect during the self-help period if they had not been included in a Section 6 notice of proposed change. It considered whether a railroad, during a strike, could suspend particular Rules of its indefinite contract (which were admittedly still in effect in accordance with their terms) and were, in fact, the subject of Section 6 notices as to which the statutory mediation and status quo procedures had not been exhausted.[22] As the Court said,

---

22 At the time, railroad collective bargaining agreements typically consisted of separate and independent "Rules" and provided that each Rule could be changed only after service of a Section 6 notice as to that particular Rule. *See* Burgoon, *Mediation Under the Railway Labor Act*, in National Mediation Board, *The Railway Labor Act at Fifty*, 72 (U.S.G.P.O. 1976) ("Railroad agreements do not expire on a given date but remain in effect until one party or the other proposes modification of certain of the agreement's provisions . . . ."); Rehmus, *Evolution of Legislation Affecting Collective Bargaining in the Railroad and Airline Industries*, in National Mediation Board, *The Railway Labor Act at Fifty*, 17 (U.S.G.P.O. 1976) ("Unlike almost all other industrial relationships in the United States, railroad collective bargaining agreements are not commonly of fixed duration.").

The *FEC* decisions contain no fewer than a dozen references to the "existing agreements" between the parties. (384 U.S. at 241, 242, 243; 348 F.2d 682, 684, 685, 686; 252 F. Supp. 586, 587, 589) And, the briefs submitted to the Court by all parties repeatedly emphasized that those agreements were indefinite and, therefore, in effect when the railroad made the changes before the Court. *See, e.g.*, Consolidated Brief of Railway Labor Executives Association, 15 ("[T]he collective bargaining agreements here involved . . . do not contain a specific termination date but provide that they are to continue in effect until revised in accordance with the statute . . . .") (footnote omitted); Brief for the United States as Respondent in No. 783, 4 ("FEC's agreements typically contain express conditions that the

> FEC proposed formally [by Section 6 notices] to abolish all the existing collective bargaining agreements and to substitute another agreement that would make rather sweeping departures in numerous respects from the existing collective bargaining agreements. *FEC*, 384 U.S. at 241.

Suit was brought by various unions and the United States, in parallel actions, claiming that the railroad's "unilateral abrogation of the existing collective bargaining agreements" violated the Act. *Id.* at 242. The Court of Appeals held that FEC had violated the Act, but ruled that it "could unilaterally institute such changes in its existing agreements as the District Court found to be 'reasonably necessary to effectuate its right to continue to run its railroad under the strike conditions.' " *Id.* After a hearing, the district court granted some of FEC's requests to depart from its existing agreements and denied others. The Court of Appeals affirmed.

Before this Court, the railroad argued that its obligation to comply with the existing agreements was suspended during the strike and, therefore, that wholesale departures from those agreements should be permitted. The unions, supported by the United States, contended that RLA Section 2 Seventh required the carrier to operate in strict compliance with the existing agreements until exhaustion of the statutory procedures as to every proposed change, and that the unions' resort to self-help did not release the railroad from the letter of its statutory obligation.

---

rules and rates of pay contained therein 'shall be subject to change only in the manner prescribed by law' . . . ."); Reply Brief of Association of American Railroads ("AAR"), 2 ("Florida East Coast and the railroad industry contend that *otherwise applicable collective bargaining agreements* are suspended during strikes . . . .") (emphasis added); Brief of AAR, 26; Brief for the United States, 38-39 n.27; Reply Brief of AAR, 29, *reprinted in* 98 U.S. Supreme Court Records and Briefs (Oct. Term 1965).

This Court, with a single dissent by Justice White, rejected both positions and affirmed the Court of Appeals, emphasizing that carriers have an affirmative duty to make "reasonable efforts to maintain the public service at all times. . . ." *Id.* at 245. If exhaustion of the statutory procedures were required as to every strike-related departure from each rule of existing agreements, the Court said, "[t]he practical effect . . . would be to bring the railroad operations to a grinding halt" and "both the carrier's right of self-help and its duty to operate, if reasonably possible, might well be academic . . . ." *Id.* at 246.

This Court, in other words, upheld the authority of the federal courts to permit a carrier, during a strike, to depart from the terms of an existing agreement to the extent "reasonably necessary" to allow the carrier to maintain the public service. *Id.* at 248. In that context, the Court's eloquent lecture about the "spirit" of the Act—emphasizing that the authority it recognized must be narrowly construed—is not surprising. Because the Court interpreted the Act as permitting the carrier to depart from an otherwise enforceable agreement when its right of self-help and the public service were at stake, the Court emphasized that the carrier would in any event not be permitted to deviate at will from the spirit of the Act, which is that existing agreements be honored.

Everything the Court said, however, was premised on the existence of collective agreements that all parties conceded were in effect, in accordance with their terms, during the strike. The Court said nothing about continuation of provisions in an agreement for a fixed term after the term had lapsed.

B. The Eighth Circuit Misconceived Both the Legal Premises of *FEC* and the Controlling Facts of This Case.

Four Circuit Courts of Appeals have spoken on *FEC*: the Ninth Circuit in *International Association of Machinists* v. *Reeve Aleutian Airways*, 469 F.2d 990 (9th Cir. 1972), *cert. denied*, 411 U.S. 982 (1973); the First Circuit in *International Association of Machinists* v. *Northeast Airlines*, 536 F.2d 975

(1st Cir.), *cert. denied*, 429 U.S. 961 (1976); the Seventh Circuit in *EEOC* v. *United Air Lines*, 755 F.2d 94 (7th Cir. 1985) and in *Air Line Pilots Association* v. *United Air Lines*, 802 F.2d 886 (7th Cir. 1986), *cert. denied*, 107 S.Ct. 1605 (1987); and most recently the court below.

1. In *IAM* v. *Reeve Aleutian*, the union had served a Section 6 notice; the carrier "gave no notice of any intended change" in the agreement; the parties had exhausted the mediation and status quo procedures of the RLA without reaching a new agreement; and the union had struck the carrier. 469 F.2d at 991-92. Neither party had proposed a change in the union security provisions of the agreement. When the union discontinued the strike, it requested the carrier to honor the union security and other provisions of the last agreement; the carrier refused. The union then brought suit for a declaratory judgment "that the agreement continued in effect by operation of the Act save as to the provisions which had been subjected to the Act's procedures." *Id.* at 992.[23]

The Ninth Circuit, however, agreed with the district court's conclusion that the carrier had no obligation, after the status quo ended, to enforce union security or dues check-off:

> "There is nothing in the Railway Labor Act which extends a contract beyond its termination date. 45 U.S.C.A. § 156 (1954) merely prohibits any unilateral changes in pay, rules, and working conditions until the statutory conciliation procedures have been exhausted and the 30-day mandatory waiting period has expired. . . . .
>
> The terms of the agreement called for its termination on the first day of April following notice by *either* party of intended changes . . . . [I]t is of no consequence that

23 The duration clause in *Reeve Aleutian* was, in all its essentials, the same as that before the court below. *Compare* 469 F.2d at 991, *with* App. Cert. 78. The district court had held, as a matter of law, that the collective agreement "expired by its own terms . . . following plaintiff's notice of proposed modifications in the existing agreement, although [the carrier] was obliged by the [RLA] to maintain the status quo until the statutory mediation provisions were exhausted." 330 F. Supp. 332, 335 (D. Alaska 1971).

> only portions of the contract were subject to negotiation. The contract expired by its own terms on April 1, 1968. The only effect of the Railway Labor Act was to prevent the defendant from making any unilateral changes in pay, rules, and working conditions until remedies under the Act had been exhausted on October 18, 1968." 469 F.2d at 992-93 (emphasis in original).[24]

With respect to the IAM's reliance on *FEC*, the Ninth Circuit found that decision to have no application to the case before it because

> [*FEC*] dealt with a contract that had no termination date and that continued in force until a new contract had been reached. The question there was whether the contract continued in effect during the course of a strike. It was held that the strike did not serve to terminate the contract. Here, however, it is not the strike but the contract terms themselves that have brought the contract to an end. *Id.* at 993.[25]

24 The Second Circuit reached essentially the same conclusion in *Flight Engineers International Association* v. *Eastern Air Lines*, 359 F.2d 303, 310 (2d Cir. 1966), where the union sought an order requiring the carrier to submit to a board of adjustment the claim that replacement of strikers had violated the parties' agreement. Agreeing with the carrier, the Court of Appeals held that after the agreement had expired by its terms, and the status quo period had ended, there was no contract to be interpreted and no obligation on the carrier's part to submit disputes to a System Board.

See also Manning v. *American Airlines*, 329 F.2d 32, 34-35 (2d Cir.), *cert. denied*, 379 U.S. 817 (1964) (effect of Section 6 is to extend only for a "limited period," *i.e.*, until the end of the status quo period, dues check-off agreement that had "admittedly expired"); *Airline Pilots Association* v. *Pan American World Airways*, 765 F.2d 377, 382 (2d Cir. 1985) (holding that "nothing in the Act, or the case law interpreting it . . . prevents parties from setting, by freely negotiated agreement," the duration of concessions on which they may reach agreement).

25 *See also International Association of Machinists* v. *Aloha Airlines*, 776 F.2d 812, 816 (9th Cir. 1985); *International Association of Machinists* v. *Qantas Airways*, 122 L.R.R.M. 2263 (N.D. Cal. 1985).

2. The First Circuit, citing *Reeve Aleutian* approvingly, has agreed with the Ninth Circuit's interpretation of *FEC*. *IAM* v. *Northeast Airlines*, *supra*, 536 F.2d at 978 n.2 ("In general, the terms of a Railway Labor Act collective bargaining agreement are not controlling after the collective bargaining agreement and any subsequent status quo period expire.")

3. The Seventh Circuit too has read *FEC* as arising "in a situation where the collective bargaining agreement was still in effect . . ." and rejected as "tenuous" a union's reliance on *FEC* "in a case in which the collective bargaining agreement had already expired prior to the strike . . . ." *ALPA* v. *United Air Lines*, *supra*, 802 F.2d at 898-99, 910.[26]

4. In contrast, the Eighth Circuit announced a "special rule" it purported to find in *FEC*:

> if a working condition has not been subject to the procedures of the Act, it may not be changed even after expiration of the status quo period unless truly necessary for the continued operation of the airline. (App. Cert. 16)

---

26 Suggesting another possible standard that might be derived from *FEC*—at least where some condition of employment other than union security is at issue and, therefore, RLA Section 2 Eleventh does not govern (see pp. 20 to 26, *supra*), and retaliation against the union is discerned—the Seventh Circuit noted:

> Although [*FEC*] arose in a situation where the collective bargaining agreement was still in effect, we see no reason to depart totally in the post-contract period from its holding that some showing of a reasonable business justification is required before a court will allow an employer to implement self-help measures which whether intentional or not on their face, undercut the union's ability protected by the RLA to function as an effective representative for its members. *Id.* at 898-99 (citations omitted).

Dicta in an earlier Seventh Circuit decision under the Federal Age Discrimination in Employment Act (29 U.S.C. §§ 621 *et seq.*) suggest a different view of *FEC*. *EEOC* v. *United Air Lines*, *supra*, 755 F.2d at 98. The panel there, however, assumed, without having to decide, that *Reeve Aleutian* was correct, finding the duration clause of the agreement before it to be materially different from that before the Ninth Circuit in *Reeve Aleutian*. (See n.?, *supra*.)

This statement of the "rule" ignored the central fact of *FEC*, that the contract there was not for a stated term, and that each Rule was treated, in the duration clause, as though it were a separate indefinite contract requiring specific Section 6 notice of change.[27]

The Eighth Circuit misread *FEC* by ignoring what the Court did (and did *not*) decide there and by focusing instead on what it said about its reasons for permitting only limited deviations from an existing and otherwise enforceable contract. This Court did not say that labor contracts could not expire by agreement, or that the spirit of the Act requires the honoring of even expired agreements. Indeed, nothing in the Court's reference to the "spirit" of the Act suggests, as the court below concluded, that the Act *requires* "continuing agreements between management and labor." (App. Cert. 12)

Speaking of the unexpired contracts from which the carrier had been permitted to deviate, the Court said that "[w]ere a strike to be the occasion for a carrier to tear up and annul, so to speak, the entire collective bargaining agreement, labor-management relations would revert to the jungle." 384 U.S. at 247. The Court did not say that if a contract were allowed to expire by agreement that would be a reversion to the jungle. In fact, although carrier and employees are under the obligation of RLA Section 2 First to make every reasonable effort to reach agreement, the Act does not regard their failure to do so as a prohibited "jungle" condition. To the contrary, as the Court fully acknowledged in *FEC*, the Act affords the parties the right to self-help if they have not reached agreement after exhausting the processes of the Act. 384 U.S. at 244.

This Court simply had no occasion in *FEC* to address whether carriers and unions may, consistent with the policies of the Act, negotiate a termination date for their agreements, because the parties there had not in fact done so. Nor was it

---

27 Toward the end of its opinion, the Eighth Circuit apparently acknowledged that the agreements before the Court in *FEC* had not expired by their terms. (App. Cert. 18) At no other point in its opinion, however, despite lengthy quotations from, and repeated discussion of, *FEC*, does the Eighth Circuit make any reference to that pivotal factual distinction.

called upon to consider whether the spirit of the Act requires that collective agreements be construed as "continuing" (App. Cert. 12) even if they are for a specified term; no such agreement was before the Court. Even more important, with respect to union security and dues check-off provisions, the Court had no occasion to speak—and did not speak—on the policies expressed in RLA Section 2 Eleventh or their application to a contract for a stated term.

In the particular circumstances presented here, it is simply incorrect to take out of context, and "emphasize," as did the court below, talk of " 'tear[ing] up . . . the entire collective bargaining agreement' " and " 'rever[sion] to the jungle.' " (App. Cert. 13) Enforcement of Article 28 of the 1981-84 agreement between TWA and IFFA—as written—would no more remit the parties "to the jungle" than does the NLRA when it treats union security and dues check-off provisions as solely a product of voluntary agreement and, therefore, extinct when a contract for a fixed term expires.

III. THE "SPECIAL RULE" ANNOUNCED BY THE COURT BELOW IS NOT REQUIRED BY THE TERMS, THE PURPOSES OR THE SPIRIT OF THE RLA AND, BY UNDERMINING THE COLLECTIVE BARGAINING PROCESS, WOULD DISSERVE THE PRINCIPAL OBJECTIVE OF THE ACT—THE VOLUNTARY ADJUSTMENT OF LABOR DISPUTES.

It is not necessary for this Court to reach the broad question of whether the RLA generally requires that working conditions set forth in an expired agreement, and not included in a Section 6 notice, be maintained beyond the statutory status quo period.[28] The Ninth Circuit, however, held in *Reeve*

28 Indeed, even if it were necessary, there is serious question whether it would be appropriate for the Court to do so based on the very limited record in this case. We note, for example, that the Eighth Circuit's "rule"—announced on cross-motions for summary judgment limited to union security provisions, and without benefit of any consideration of its broader impact or application—raises infinitely more questions than it answers as to what is required by way of notice or discussion to determine that a contract provision, in whole or in part, has been "subject to the procedures of the Act." (App. Cert. 16)

Aleutian that the RLA imposes no such requirement. Its rationale, moreover, was completely contrary to the basic premise of the court below, that the Act requires "continuing agreements." The *ratio decidendi* of the Ninth Circuit, therefore, furnishes an alternative ground for decision that union security clauses do not survive the stated term of the agreement of which they are a part, in addition to the independent reason that their validity is governed by RLA Section 2 Eleventh.

A. The Act Does Not Require "Continuing Agreements Between Management and Labor."

The RLA " 'does not undertake governmental regulation of wages, hours or working conditions.' " *Brotherhood of Locomotive Engineers* v. *Baltimore & Ohio Railroad*, 372 U.S. 284, 289 (1963) (quoting *Terminal Railroad Association of St. Louis* v. *Brotherhood of Railroad Trainmen*, 318 U.S. 1, 6 (1943)); *see also Virginian Ry. Co.* v. *System Federation No. 40*, 300 U.S. 515, 548 (1937). Indeed, when this Court held that the obligation in RLA Section 2 First "to exert every reasonable effort to make and maintain agreements . . ." is judicially enforceable, it cautioned that "great circumspection should be used in going beyond cases involving 'desire not to reach an agreement,' for doing so risks infringement of the strong federal labor policy against governmental interference with the substantive terms of collective-bargaining agreements." *Chicago & North Western Ry. Co.* v. *United Transportation Union*, 402 U.S. 570, 579 n.11 (1971). Nothing in the Act itself, or in this Court's decisions interpreting it, suggests that this "strong federal labor policy" applies with any less force to duration clauses than it does to any other contract term.

Yet the decision below is predicated on the proposition that the parties may not contract for a fixed term. Instead, according to the Eighth Circuit, having once signed a contract, the

carrier is bound indefinitely to provisions that neither party requested be changed. The incongruous result is to bind one party to a "mutilated" agreement (App. Cert. 39 n.8) it never made, while the other is free to engage in unrestricted self-help under a statute designed to foster voluntary agreements and consciously devoid of any compulsory mechanism for regulating their substantive terms.

The Eighth Circuit concluded that the union security provisions are still in effect because TWA did not propose to eliminate them from a new agreement, or bargain with IFFA during the status quo period over whether they would remain in effect if the parties *failed* to reach a new agreement. But TWA did not want to eliminate those provisions from a new agreement, and bargaining about the conditions to be in effect during "self-help" (*i.e.*, if there was a strike) would have been a useless exercise and is not required by the statute. *See Air Line Pilots Association* v. *United Air Lines*, 802 F.2d 886, 908 (7th Cir. 1986), *cert. denied*, 107 S.Ct. 1605 (1987); *Capitol-Husting Co.* v. *NLRB*, 671 F.2d 237, 246 (7th Cir. 1982); *NLRB* v. *Abbott Publishing Co.*, 331 F.2d 209, 213 (7th Cir. 1964); *Hawaii Meat Co.* v. *NLRB*, 321 F.2d 397 (9th Cir. 1963).

The assertion that enforcement of the duration clause of the 1981-84 agreement would permit TWA to "opt out" of the statutory major dispute procedures (App. Cert. 38) begs the question whether Section 6 requires negotiation of every provision in an agreement in order for the carrier to be relieved of the obligation to enforce them, even when the agreement is for a fixed term. It also ignores the fact that TWA bargained with IFFA for nearly two years, in an effort to make a new agreement, in accordance with the statutory procedures and through a lengthy status quo period after expiration of the 1981-84 agreement.

The claim that TWA has not complied with Section 6 is, in any event, based on a distortion of that section, which provides simply for notice of "an intended change in agreements . . . ," not for notice of "intended change[s] in agreements" or for notice of "[each] intended change in agreements"—and

certainly not for notice of changes that the carrier will make in the absence of agreement.[29] Nothing in Section 6 supports the notion that a collective agreement entered into for a fixed duration must be treated like a series of severable mini-contracts, subject to change only by amendment of specific terms. Nor is there anything to suggest that the agreements of which Section 6 speaks may not (like other contracts) be regarded as integrated documents requiring the consent of both parties.

The bargaining structure that has developed in the airline industry, under Section 6, confirms that an integrated contract for a fixed term is the norm:

> The airlines . . . use the same Section 6 procedures under the Railway Labor Act as the railroads do in their bargaining, but they negotiate complete contracts which expire in their entirety at an agreed-upon date. Airline

---

29 Similarly, nothing in Section 2 Seventh requires that TWA continue in effect an expired agreement, or precludes the parties from "prescribing" that an agreement will expire on a fixed date. It does not say that any agreement in the railroad or airline industry must be perpetual, or that Section 6 continues provisions in an expired agreement beyond the status quo periods established by the Act. By its terms, Section 2 Seventh applies only to conditions "embodied in agreements"—not "[once] embodied in agreements" and not "embodied in [expired] agreements." It also expressly permits the parties to change conditions "in the manner prescribed in [their] agreements"—including the manner prescribed in Article 28 of the 1981-84 agreement.

This Court has made plain, moreover, that Section 2 Seventh has no role in imposing a status quo during the negotiation period, let alone after it:

> Section 2 Seventh, which was added to the Act in 1934, does not impose any status quo duties attendant upon major dispute procedures. It simply states one category of cases in which those procedures must be invoked. The purpose of § 2 Seventh is twofold: it operates to give legal and binding effect to collective agreements, and it lays down the requirement that collective agreements can be changed only by the statutory procedures. *Detroit & Toledo Shore Line Railroad Co.* v. *United Transportation Union*, 396 U.S. 142, 156 (1969).

TWA did attempt to reach a new agreement through the statutory procedures, which impose no additional status quo obligation after the expiration of the final 30-day cooling off period.

> bargaining, in that respect, has developed along the same lines as in industry generally, without being restricted in its structure by the requirements of the Act. Burgoon, *Mediation Under the Railway Labor Act*, in National Mediation Board, *The Railway Labor Act at Fifty*, 94 (U.S.G.P.O. 1976).

The First, Second, Seventh and Ninth Circuits have acknowledged that RLA agreements do "expire" or "terminate" in accordance with their terms.[30] And the Seventh and Ninth Circuits have expressly recognized that nothing this Court said in *FEC* changes that. Only the Eighth Circuit has read the Railway Labor Act and this Court's opinion in *FEC* as requiring "continuing agreements between management and labor." (App. Cert. 12)

The construction of Article 28 by the court below would destroy the very meaning of a contract between a carrier and a union establishing conditions of employment. To require the carrier in the absence of labor peace to continue to adhere to an agreement after its stated term has ended, particularly provisions that benefit the union rather than the employees covered by the agreement, is to abandon the idea of agreement and to impose substantive obligations on the carrier without agreement. The Act neither requires nor permits such a result.

---

30 *See ALPA* v. *United Air Lines*, *supra*, 802 F.2d at 910 (speaking of the "already expired" airline agreement before the court); *International Association of Machinists* v. *Aloha Airlines*, 776 F.2d 812, 816 (9th Cir. 1985) (referring to two RLA agreements that "expired by their own terms"); *Air Cargo, Inc.* v. *Local Union 851, International Brotherhood of Teamsters*, 733 F.2d 241, 243 (2d Cir. 1984) (referring to the "expiration of the agreement"); *International Association of Machinists* v. *Northeast Airlines*, 536 F.2d 975, 978 n.2 (1st Cir.), *cert. denied*, 429 U.S. 961 (1976) (speaking of the period after an RLA collective agreement "expire[s]"); *Flight Engineers International Association* v. *Eastern Air Lines*, 359 F.2d 303, 309 (2d Cir. 1966) (referring to the "terminated" collective bargaining agreement); and *Manning* v. *American Airlines*, 329 F.2d 32, 35 (2d Cir.), *cert. denied*, 379 U.S. 817 (1964) (describing an airline agreement as "admittedly expired"); *cf. Burlington Northern Railroad Co.* v. *Brotherhood of Maintenance of Way Employes*, 107 S.Ct. 1841, 1844 (1987) (speaking of the railroad agreement between the parties that "expired in 1984").

B. The Act Does Not Authorize Judicial Imposition of a "Partial" Status Quo After the Statutory Procedures Have Been Exhausted.

The major purpose of Congress in enacting the Railway Labor Act "was 'to provide a machinery to prevent strikes.' " *Texas & New Orleans Railroad Co.* v. *Brotherhood of Railway & Steamship Clerks*, 281 U.S. 548, 565 (1930). The design of the Act is a unique blend of freedom and compulsion, aimed at settlement through conference, mediation, voluntary arbitration, Presidential intervention, the force of public opinion and ultimately, if the statutory machinery fails to produce agreement, resort to traditional self-help measures. 45 U.S.C. §§ 2 First and Second, 5, 6, 7, 10; *see also Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969). This "step-by-step framework . . . is carefully drawn to introduce slightly different [and gradually escalating] pressures upon the parties to reach settlement . . . ." *Chicago & Northwestern Ry. Co.* v. *United Transportation Union*, *supra*, 402 U.S. at 597 (Brennan, J., dissenting).

The statutorily required status quo period is "central" to the design of the Act (*Detroit & Toledo Shore Line Railroad Co.* v. *United Transportation Union*, 396 U.S. 142, 150 (1969)) and, as it did here, typically lasts literally for years. As this Court has explained,

> Its immediate effect is to prevent the union from striking and management from doing anything that would justify a strike. In the long run, delaying the time when the parties can resort to self-help provides time for tempers to cool, helps create an atmosphere in which rational bargaining can occur, and permits the forces of public opinion to be mobilized in favor of a settlement without a strike or lockout. Moreover, since disputes usually arise when one party wants to change the status quo without undue delay, the power which the Act gives the other party to preserve the status quo for a prolonged period will frequently make it worthwhile for the moving party to compromise with the interests of the other side and

thus reach agreement without interruption to commerce. 396 U.S. at 150.

Equally significant to the design of the Act are those compulsions that Congress consciously refrained from imposing, *i.e.*, the imposition of substantive terms after exhaustion of the statutory procedures. "Every facility for bringing about agreement is provided and pressures for mobilizing public opinion are applied. The parties are required to submit to the successive procedures designed to induce agreement. . . . But compulsions go only to insure that those procedures are exhausted before resort can be had to self-help." *Elgin, Joliet & Eastern Ry. Co.* v. *Burley*, 325 U.S. 711, 725 (1945).

Thus, the Act provides a federally sanctioned forum in which labor and management are required to bargain with each other, under the supervision of the National Mediation Board, before resorting to economic warfare. It contains no fewer than three status quo directives. 45 U.S.C. §§ 5 First, 6, 10. And it gives to the NMB the power to hold the parties in mediation and thereby "to make the exhaustion of the Act's remedies an almost interminable process." *Detroit & Toledo*, *supra*, 396 U.S. at 149.

Once those procedures have been exhausted, however, the Act does not limit the respective rights of the parties to engage in self-help. "Nowhere does the text of the Railway Labor Act specify what is to take place once [its] procedures have been exhausted without yielding resolution of the dispute." *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, *supra*, 394 U.S. at 378. Nor does its legislative history contain any suggestion of Congressional intent that there be an additional status quo requirement with respect to any provision of the last contract once the status quo period as to *all* such provisions has expired and the strike that the Act was designed to discourage has occurred.[31]

31 The Eighth Circuit's formulation of its "special rule" makes clear, however, that the court was creating a status quo requirement in addition to and beyond the status quo requirements established by the Act. Thus, the court said: "[I]f a working condition has not been subject to the procedures of the Act, it may not be changed *even after expiration of the status quo period* unless truly necessary for the continued operation of the airline." (App. Cert. 16; emphasis added)

The Railway Labor Act establishes a series of steps that the parties must follow before they can be released to self-help. Those steps are intended to create the optimum conditions under which the parties may seek to reach a new agreement. No change is to be made in *any* condition of employment that is in effect when negotiations begin. The National Mediation Board is called upon as an active participant in the negotiations and great discretion is given to the Board to keep the negotiations in process.

All provisions of an agreement are grist for the mill of the Mediation Board. Both parties know that if there is no new agreement they may engage in self-help. There is nothing in the statute that says that a carrier may engage in self-help only as to those matters which have been specifically discussed. Throughout the long mandated negotiations, both parties are in effect saying to each other that if they cannot arrive at a new agreement, there will be no agreement.

The Board's efforts are directed to achieving a new agreement and it may extend the negotiations for so long as it considers it reasonably possible to achieve that objective. It is only the Board that can release the parties from mediation and start the final thirty-day period after which the parties will be free to resort to self-help. Even after that thirty-day period, there is provision for the appointment of an emergency board, if necessary, which further extends the status quo. And, finally, the history of the Act demonstrates that if the procedures initiated by the emergency board are unsuccessful, Congress may legislate to settle the strike and the dispute.

Thus, the entire scheme of the Act, its legislative history and its administration make clear that the determination whether there will be further government intervention in the dispute, after the final thirty-day cooling off period, is left to the

Executive branch and to Congress. Neither has been reluctant to exercise that power. During the fifty years following the establishment of the National Mediation Board, 204 emergency boards were Presidentially-appointed pursuant to Section 10 of the Act. 50 NMB Ann. Rep. 46 (1984). And, when Congress deemed it appropriate, legislation extending the statutory cooling-off period, or even imposing substantive terms on the parties, has been enacted. *See, e.g.*, Act of Aug. 21, 1986, Pub. L. No. 99-385, 1986 U.S. Code Cong. & Admin. News (100 Stat.) 819 (extending statutory cooling-off period for 60 additional days); Act of Sept. 30, 1986, Pub. L. No. 99-431, 1986 U.S. Code Cong. & Admin. News (100 Stat.) 987 (imposing recommendation of Presidential emergency board and ordering binding arbitration); *see also Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, *supra*, 394 U.S. at 379, 379 n.13; *United Transportation Union* v. *Georgia Railroad*, 452 F.2d 226, 227 (5th Cir. 1971), *cert. denied*, 406 U.S. 933 (1972); *Brotherhood of Railroad Trainmen* v. *Akron & Barberton Belt Railroad Co.*, 385 F.2d 581, 589-90 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 923 (1968).

Absent such *ad hoc* intervention, however, the parties are free "to employ the full range of whatever peaceful economic power they can muster, so long as its use conflicts with no other obligation imposed by federal law." *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, *supra*, 394 U.S. at 392. As this Court stated in *Brotherhood of Locomotive Engineers* v. *Baltimore & Ohio Railroad*, *supra*, 372 U.S. at 291, "both parties, having exhausted all of the statutory procedures, are relegated to self-help in adjusting this dispute, subject only to the invocation of the provisions of § 10 providing for the creation of an Emergency Board."

Most recently, in *Burlington Northern Railroad Co.* v. *Brotherhood of Maintenance of Way Employes*, 107 S. Ct. 1841, 1850-51 (1987), the Court unanimously reaffirmed the unrestricted right to exercise self-help after the processes of the RLA have been exhausted. The Court there stated:

> The RLA subjects all railway disputes to virtually endless "negotiation, mediation, voluntary arbitration and conciliation" . . . . Moreover, *the RLA requires all parties* both "to exert every reasonable effort to make and maintain" collectively bargained agreements, § 2 First, and *to abide by the terms of the most recent collective-bargaining agreement until all the settlement procedures provided by the RLA have been exhausted* . . . . Nevertheless, if the parties exhaust these procedures and remain at loggerheads, they may resort to self-help in attempting to resolve their dispute, *subject only to such restrictions as may follow from the invocation of an Emergency Board under § 10 of the RLA*. (Emphasis added; citations and footnote omitted)

The courts do not sit to regulate the self-help measures adopted by the parties. Rather, as the Court held in *Burlington Northern*, "it is for the Congress, and not the Courts, to strike the balance 'between the uncontrolled power of management and labor to further their respective interests.' " *Id.* at 1855. *See also American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 317-18 (1965); *NLRB* v. *Insurance Agents' International Union*, 361 U.S. 477, 490 (1960).

C. If Allowed to Stand, the Eighth Circuit's "Special Rule" Will Engender Unnecessary Disputes, Disturb the Bargaining Atmosphere that the Act Seeks to Create, and Alter the Incentives For Voluntary Agreement.

The whole thrust and objective of the major dispute procedures of the RLA is the voluntary adjustment of disputes. Toward that end, in mutual recognition that a collective agreement is an integrated whole, a party's proposals (and Section 6 notice) typically address only those terms of an existing agreement that it desires to change in a new agreement—assuming that agreement is reached with resultant labor peace. In other words, the terms not made the subject of a Section 6 notice are understood to be acceptable to both parties if (and only if) agreement is reached on those matters in dispute.

This narrowing of the areas of controversy serves to facilitate agreement and, therefore, effectuates the purposes of the Act. It does not reflect, and cannot reasonably be construed as

evidencing a willingness by either party to accept the terms not referred to in a Section 6 notice, absent an overall agreement reached without resort to economic warfare. Nor, for obvious reasons, do carriers and unions exchange dual sets of proposals addressing, on the one hand, what terms will be acceptable if agreement is reached through the statutory procedures and, on the other, what terms will govern in the event of a strike.

Thus, a Section 6 notice with respect to a collective agreement like the 1981-84 agreement, which expires by its terms on a date certain, is properly viewed as a proposal for a new integrated agreement. It places in controversy *all* terms of the old agreement, but (in the hope of facilitating agreement) narrows the focus of discussions to those particular items that will be changed if an overall agreement can be reached through the statutory procedures. The practical effect of the Eighth Circuit's approach would be to compel carriers, in order to preserve their right to engage in self-help in the event of a strike, to include virtually every term of an existing agreement in a Section 6 notice—even if that term would be acceptable given agreement on changes in other terms.

At least heretofore, for example, a carrier has been able to agree to union membership and dues check-off provisions, as part of an integrated labor contract, with the expectation that they would be coexistent with the labor peace that the contract (and any subsequent status quo period imposed by statute) represent. It has not been necessary, when a Section 6 notice of intended change is served, to inject the sensitive issue of union "security" into the negotiations, by proposing to delete those provisions from the agreement, if they would be acceptable to the carrier in a new integrated agreement.

The Eighth Circuit's approach fails to recognize these realities. The full implications of its "rule," in an endeavor where atmospherics are as vital as substance, are difficult to predict. A proposal to eliminate union security requirements, or other provisions such as free travel passes for nonemployees, may

inflame the negotiations; it may be used by either party to justify a failure to reach agreement on other subjects; it may produce a strike that would not otherwise have occurred. Plainly, however, requiring such a proposal—as a prerequisite to the expiration of union membership requirements—would at the very least broaden the area of conflict between the parties, unnecessarily inject sensitive issues like union security into the bargaining process and taint the bargaining atmosphere that the Act seeks to create.[32]

Thus, the "special rule" announced by the Eighth Circuit to preserve collective bargaining would, particularly as applied to union security provisions, reduce the likelihood of voluntary adjustment of disputes, thereby frustrating the purposes of the Act. The court below took "judicial notice that labor relations in the airline industry have entered a different era, one of strife and turmoil . . . ." (App. Cert. 15) If its decision is allowed to stand, that statement may well be validated by new areas of dispute spawned by the decision.

---

32 The alternatives, at least under the Eighth Circuit's "special rule," are equally unavailing as a matter of sound industrial relations. The carrier could, of course, decline to agree to union security or other provisions in the first instance, thereby eliminating any need to bargain out of them later in the event of a failure to reach agreement on a successor agreement. Or, having once agreed to such provisions, the carrier could refrain from proposing their deletion, to avoid inflaming the negotiations, in the hope that agreement will be reached without a strike. In that event, however, the carrier (and the public) would have to forego the motive power for agreement that flows from the union's knowledge that compulsory union dues and dues check-off, or other provisions that benefit the union, will cease if agreement is not reached through the statutory procedures.

CONCLUSION

The decision below, contrary to clear legislative intent, untenably interferes with the employer's right to self-help by forcing it to give economic support to a union while that union is exercising its unrestricted right to self-help, including strike. The decision, moreover, forces employees who oppose the union's strike and continue working or accept employment as replacements, to pay dues to that union to fund its efforts both to prolong its strike and to displace those employees. The legislative history of RLA Section 2 Eleventh cannot be read to require or permit a different treatment of union security clauses from that established under the NLRA. Nor can it be read to permit or require the irrational result that strike replacements must support the strike they are working to defeat. The decision below should, therefore, be reversed.

Respectfully submitted,

MURRAY GARTNER
PAUL E. DONNELLY
MARK A. BUCKSTEIN
MICHAEL A. KATZ

Attorneys for Petitioner

CAROLE O'BLENES

Of Counsel

August 11, 1987

RESPONDENT'S

BRIEF

Supreme Court, U.S.
FILED
OCT 5 1987
CLERK

No. 86-1650

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

TRANS WORLD AIRLINES, INC.,
Petitioner,

v.

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

RESPONDENT'S BRIEF

STEVEN A. FEHR
(Counsel of Record)
WILLIAM A. JOLLEY
DOYLE R. PRYOR
SCOTT A. RAISHER
JOLLEY, WALSH, HAGER & GORDON
204 West Linwood Blvd.
Kansas City, Missouri 64111
(816) 561-3755
Attorneys for Respondent Independent Federation of Flight Attendants

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

QUESTION PRESENTED

Under the Railway Labor Act, may an air carrier, during self-help, unilaterally implement changes in working conditions governed by the existing collective bargaining agreement, when such changes were not the subject of the Act's processes calling for notice, negotiation, mediation, and release, and when such changes are not necessary in order for the carrier to continue operations during a work stoppage?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	7
ARGUMENT	10
Preliminary Statement	10
I. The Courts Below Correctly Held That The Collective Bargaining Agreement Is An Amendable Contract Which Has Not "Expired"	13
II. Under The RLA, A Carrier May Not Achieve Through Self-Help That Which It Did Not Submit To The Processes Of The Act	17
A. § 2 Seventh Controls	17
B. The Role Of § 2 Seventh In The Scheme Of The RLA	20
C. *FEC* Is Not Distinguishable	25
D. The Case Law: *Reeve* Stands Alone As Support For TWA	30
E. The Processes Of Bargaining And Mediation Called For By The Act Would Become A Sham If TWA Is Allowed To Unilaterally Achieve What The Act Requires Be Done By The Other Orderly Procedures	37
F. There Is Nothing In The RLA Which Allows An Employer To Unilaterally Abrogate A Union Security Agreement Without Utilizing The Procedures Of The Act	39
CONCLUSION	45

TABLE OF AUTHORITIES

Cases: Page

Air Cargo, Inc. v. Teamsters Local No. 851, 733 F.2d 241 (2nd Cir. 1984) ---- 34

ALPA v. Civil Aeronautics Board, 502 F.2d 453 (D.C. Cir. 1974), *cert. den.*, 420 U.S. 972 (1975) ---- 33

ALPA v. Pan American World Airways, 765 F.2d 377 (2nd Cir. 1985) ---- 34-35

ALPA v. United Air Lines, Inc., 802 F.2d 886 (7th Cir. 1986), *cert. den.*, —— U.S. ——, 107 S.Ct. 1605 (1987) ---- 32, 36

AT&T Technologies, Inc. v. CWA, 475 U.S. 643, 106 S.Ct. 1415 (1986) ---- 17

Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1969) ---- 17, 40

Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees v. Florida East Coast Railway, 384 U.S. 238 (1966) ---- *passim*

Brotherhood of Railroad Trainmen v. Akron and Barberton Belt Railroad, 385 F.2d 581 (D.C. Cir. 1967), *cert. den.*, 390 U.S. 923 (1968)---- 29

Burlington Northern Railroad Company v. Brotherhood of Maintenance of Way Employees, —— U.S. ——-, 107 S.Ct. 1841 (1987) ---- *passim*

Chicago and North Western Railway Co. v. United Transportation Union, 402 U.S. 570 (1971) ---- 40

Colonie Fibre Co. v. NLRB, 163 F.2d 65 (2nd Cir. 1947) ---- 41

Cox v. Northwest Airlines, 319 F.Supp. 92 (D. Minn. 1970) ---- 9, 26, 31

Detroit and Toledo Shoreline R.R. Co. v. UTU, 396 U.S. 142 (1969) ---- 20, 21, 23, 24, 38

EEOC v. United Air Lines, 755 F.2d 94 (7th Cir. 1985) ---- *passim*

FEIA v. Eastern Air Lines, 359 F.2d 303 (2nd Cir. 1966) ---- 36

Goodman v. Lukens Steel Co., —— U.S. ——, 107 S.Ct. 2617 (1987) ---- 14

TABLE OF AUTHORITIES—Continued

Page

Graver Mfg. Co. v. Linde Co., 336 U.S. 271 (1949) ---- 14

Hassett Maintenance Corp., 260 N.L.R.B. 1211 (1982) ---- 42

Hotel, Motel, Restaurant Employees, Local 19, 281 N.L.R.B. No. 86 (1986) ---- 42

IAM v. Aloha Airlines, 776 F.2d 812 (9th Cir. 1985) ---- 32, 33

IAM v. Northeast Airlines, 536 F.2d 975 (1st Cir.), *cert. den.*, 429 U.S. 961 (1976) ---- 32, 33

IAM v. Reeve Aleutian Airways, 330 F.Supp. 332 (D. Alaska 1971), *aff'd*, 469 F.2d 990 (9th Cir. 1972), *cert. den.*, 411 U.S. 982 (1973) ---- *passim*

Independent Union of Flight Attendants v. Pan American World Airways, Inc., 624 F.Supp. 64 (E.D.N.Y. 1985) ---- 33

John F. Harkins Co., Inc. v. The Waldinger Corp., 796 F.2d 657 (3rd Cir. 1986), *cert. den.*, —— U.S. ——, 107 S.Ct. 939 (1987) ---- 14

Kern Oil & Refining Co. v. Tenneco Oil Co., 792 F.2d 1380 (9th Cir. 1986), *cert. den.*, —— U.S. ——, 107 S.Ct. 1349 (1987) ---- 14

Manning v. American Airlines, 329 F.2d 32 (2nd Cir.), *cert. den.*, 379 U.S. 817 (1964) ---- 34, 35, 39, 40

Order of Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342 (1944) ---- 44

Pullman-Standard v. Swint, 456 U.S. 273 (1982) ---- 14

Steele v. Louisville & N.R. Co., 323 U.S. 192 (1944) ---- 44

Texas and N.O.R. Co. v. BRAC, 281 U.S. 548 (1930) ---- 20, 21

Texas Commerce Bank National Association v. National Royalty Corp., 799 F.2d 1081 (5th Cir. 1986) ---- 14

Trico Products Corp., 238 N.L.R.B. 1306 (1978) ---- 41

Statutes:

National Labor Relations Act, 29 U.S.C. §§ 151, *et seq.* ---- *passim*

Section 14(b), 29 U.S.C. § 164(b) ---- 42, 43

TABLE OF AUTHORITIES—Continued

	Page
Railway Labor Act, 45 U.S.C. §§ 151, *et seq.*	*passim*
Section 1(a), 45 U.S.C. § 151(a)	26
Section 2 Fourth, 45 U.S.C. § 152 Fourth	32
Section 2 Seventh, 45 U.S.C. § 152 Seventh	*passim*
Section 2 Eleventh, 45 U.S.C. § 152 Eleventh	*passim*
Section 5, 45 U.S.C. § 155	2, 21, 23, 38
Section 6, 45 U.S.C. § 156	*passim*
Section 10, 45 U.S.C. § 160	21, 24, 38
Section 201, 45 U.S.C. § 181	29
Rules:	
Federal Rules of Civil Procedure	
Rule 52(a)	14
Additional Authorities:	
Arbitration Award Re Public Law No. 99-431, *BMWE v. Maine Central R.R. Co.* (Van Wart 1986)	37
Hearings on S. 3266 before the Senate Committee on Interstate Commerce, 73rd Cong., 2d Sess. (1934)	24
Hearings on S. 3295 before the Senate Subcommittee of the Committee on Labor and Public Welfare, 81st Cong., 2d Sess. (1950)	43
Hearings on H.R. 7789 before the Committee on Interstate and Foreign Commerce, 81st Cong., 2d Sess. (1950)	43
Report of the Committee on Labor and Public Welfare of the United States Senate on S. 3295 (81st Cong., Report No. 2262, 1950)	42, 43
Report to the President by Emergency Board No. 209 (Harris, Kasher, and Peterson, members, 1986)	37

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1650

TRANS WORLD AIRLINES, INC.,
Petitioner,
v.
INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF

STATEMENT OF THE CASE

On April 1, 1977, Respondent Independent Federation of Flight Attendants ("IFFA") was certified by the National Mediation Board ("NMB") as the labor union representing flight attendants in the employ of Petitioner Trans World Airlines, Inc. ("TWA")[1], pursuant to the Railway Labor Act ("RLA" or "the Act"), 45 U.S.C. § 151, *et seq.* Since that date IFFA has remained the collective bargaining representative of TWA's flight attendants. In 1983, IFFA and TWA signed a collective bargaining agreement. Article 28 of that agreement states in part:

[1] IFFA succeeded the Transport Workers Union, which had previously succeeded the Air Line Stewards and Stewardesses Association as the labor representative of TWA's flight attendants. The first collective bargaining agreement between TWA and its flight attendants was signed in 1947, and the agreement signed in 1983 was the fifteenth such contract.

> Except as otherwise specified in this Agreement, this entire Agreement shall be effective August 1, 1981 shall remain in effect until July 31, 1984, and thereafter shall renew itself without change for yearly periods unless written notice of intended change is served in accordance with Section 6. . . . (Pet. App. 2a).[2]

In 1984, the parties exchanged § 6 (45 U.S.C. § 156) notices of specified intended changes and began the statutory process under the RLA of negotiation and mediation under the auspices of the NMB. (Pet. App. 2a). Neither party proposed the elimination of the "union security" provisions contained in the existing contract. In late January of 1986, the NMB offered binding arbitration to the parties pursuant to § 5 (45 U.S.C. § 155), but TWA refused the proffer. (Pet. App. 3a). The parties were then released by the NMB and allowed to engage in self-help as of March 7, 1986. On that date, TWA unilaterally implemented numerous unilateral changes in rates of pay, rules, and working conditions, and IFFA then struck the airline. TWA did not limit its unilaterally implemented changes to matters which had been the subject of § 6 Notices and subsequent negotiation and mediation. Among the contractually governed working conditions unilaterally abrogated by TWA which were not the subject of negotiations were the union security provisions contained in Article 24(A-L) of the collective bargaining agreement, requiring that all working flight attendants pay dues to IFFA. *Id.*[3]

---

[2] References to the Appendix to the Petition for Certiorari will be "Pet. App. ——". The Joint Appendix will be "J.A. ——", and TWA's brief on the merits will be "TWA Br. ——".

[3] Other changes (not the subject of bargaining) included elimination of the contractual grievance procedure and various measures which altered the flight attendants' seniority and bidding rights. During the strike, and even afterwards, TWA refused to provide information as to what all of its unilateral changes were. First Amended Complaint in Case No. 86-6030-CV-SJ-6 in the United States District Court for the Western District of Missouri, p. 18 (March 18, 1986). Accordingly, when TWA sought a declaratory judgment in this case, IFFA in its Answer and Counterclaim clearly alleged that the contract survived and that TWA could only make those unilateral changes consistent with its bargaining proposals.

On April 17, 1986, TWA filed this action seeking a declaratory judgment that the collective bargaining agreement had "expired" and that it was not obligated to observe any of its provisions, regardless of whether those provisions had been the subject of negotiations. TWA asked the court to declare that "TWA has no continuing obligation to treat the union security or related provisions of the expired 1983 Agreement as having current effect, under the terms of the expired Agreement or by operation of the Railway Labor Act". (Pet. App. 94a).

IFFA's Answer stated:

> Although TWA was legally free to alter some working conditions as of March 7, 1986, TWA was not legally able to change working conditions which had not been subject to the negotiation procedures under the RLA, including but not limited to the provisions of Article 24(A-L). (Pet. App. 107a).

Moreover, IFFA's counterclaim specifically asked the court to order that:

> TWA is legally obligated to maintain the status quo in rules, rates of pay, and working conditions, except for matters which have been the subject of proposals and negotiation pursuant to Section 6 of the RLA. (*Id.*).

On May 17, 1986, the strike was halted, and strikers began returning to work in seniority order for available jobs. (Pet. App. 3a).

On August 1, 1986, with cross-motions for summary judgment pending (on both the complaint and counterclaim), the district court ruled in IFFA's favor, holding

(1) that the RLA prohibits a carrier from making unilateral changes which were not subjected to the § 6 procedures; and (2) that the contract by its terms did not expire, but was an amendable contract, and that TWA was limited (pursuant to the contract) to making those changes it had subjected to the RLA's bargaining process. (Pet. App. 30a). The district court stated the issue presented as follows:

> (1) Did Article 28, the duration provision of the contract, cause parts of the contract that were not the subject of bargaining to continue in effect, or did notice of certain intended changes trigger a total termination of the agreement? (2) If the contract provides for total termination upon impasse over proposals for limited changes, is such a duration provision lawful under the Railway Labor Act? (Pet. App. 30a-31a).

The court chose to answer the second question first. Noting that the issue centered upon § 2 Seventh of the RLA (45 U.S.C. § 152 Seventh), and reasoning from *Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees v. Florida East Coast Railway*, 384 U.S. 238 (1966), ("FEC"), which centered upon the same provision, the court concluded:

> As stated in FEC, the Act seeks to foster a "community" between labor and management and to maintain contract provisions established after "years of struggle and negotiation." 384 U.S. at 246-47. Allowing the regulated parties to establish comprehensive termination dates in their contracts would seemingly flout these purposes. Such provisions would have a greater tendency to sever the community and destroy the long established contractual provisions than would normally be expected under the procedures of § 6. *As a matter of statutory construction, the lesson of FEC appears to confine the parties to prescribing renegotiation provisions in their agreements under § 2 Seventh that are consistent with § 6 of the Act. The*

> *statutory right to provide alternate procedures by contract which are not identical with those provided in § 6 allows the parties to vary the notice periods and the like, but prevents them from lawfully causing contracts to completely self-destruct simply upon notice of specified proposed changes.* (Pet. App. 36a, footnote omitted, emphasis supplied).

The court went on to say:

> It may fairly be concluded that the right to make agreements prescribing the manner of changing contract terms, as set forth in § 2 Seventh, was intended to supplement rather than displace § 6, and cannot be construed to permit parties to "opt out" of the basic procedures of the Act. A termination provision avoiding renegotiation of undesired terms conflicts with the Act, as described in FEC, and has not been shown to have been within the contemplation of Congress when it enacted the language in question in 1934. (Pet. App. 38a).

Rejecting TWA's theory that *FEC* is distinguishable because the Court's opinion contained "implicit reference" (Pet. App. 34a) to the alleged fact that the contracts at issue there contained no termination dates, the court said that such a fact, if true

> [I]n no way undermines the binding nature of the Court's holdings with respect to the policies of the Act. Those policies are not altered by language in contracts which are necessarily subservient to it. (Pet. App. 36a).

Turning to the contract itself, the district court held that Article 28 created an amendable contract, limiting TWA to implementing unilateral changes which had been the subject of § 6 Notices and subsequent negotiation and mediation. In so holding, the court relied not only upon the language of the duration clause but also upon the undisputed evidence regarding the bargaining history and the parties' characterization of their agreement. (Pet. App. 40a-41a).

TWA appealed, but the Eighth Circuit affirmed in a unanimous panel opinion filed on January 14, 1987. (Pet. App. 1a). The court of appeals adopted the district court's formulation of the issue presented (Pet. App. 4a-5a), but concluded that since it agreed with the district court's construction of the contract, the statutory issue need not be addressed. (Pet. App. 5a, 18a, n. 5). In its analysis, the Eighth Circuit noted the bargaining history regarding the parties' own interpretation of the contract in even more detail than had the district court. (Pet. App. 8a-9a).

The court of appeals went on to discuss the case law TWA cited in its support, and found each case either to be distinguishable, unpersuasive, or in actuality supportive of IFFA.[4] In its conclusion, the Eighth Circuit said:

> In sum, to read the duration clause in the manner TWA suggests would completely undermine the collective bargaining nature of the Act. The only way to effectively achieve the goals of the Railway Labor Act is to require the parties to negotiate and mediate over those changes they wish to make. The TWA-Union duration clause was written to facilitate such negotiation and mediation. It is not for this court to rewrite the clause in the way TWA now wishes it was written, and to do so in this case would cut out the very heart of the Railway Labor Act—collective bargaining. (Pet. App. 17a-18a).

The Eighth Circuit went on to say:

> We add this comment concerning TWA's position. To read the clause as proposed by TWA frustrates the basic purpose of the RLA. An airline employer, such as TWA, may flout the entire purpose of the RLA by not filing a section 6 notice with regard to certain changes it intends to make. Under such circumstances, the carrier may hide its true intention to make certain changes so that the change is never negotiated and the NMB never has the opportunity to mediate the dispute. This leaves the carrier free to unilaterally change a condition of employment, here the extremely important condition of union security, without ever having to negotiate, mediate or arbitrate the dispute. There is simply nothing in the duration clause at issue here which leads this court to conclude that the parties intended a result so at odds with the RLA. (Pet. App. 18a).

[4] Both the district court and the Eighth Circuit were openly critical of the reasoning in *IAM v. Reeve Aleutian Airways*, 330 F.Supp. 332 (D. Alaska 1971), *aff'd*, 469 F.2d 990 (9th Cir. 1972), *cert. den.*, 411 U.S. 982 (1973) (*"Reeve"*).

SUMMARY OF ARGUMENT

1. The courts below correctly held that the collective bargaining agreement does not expire by its terms, but instead is an amendable contract. Accordingly, during self-help, the contract allows TWA to make only those changes which it submitted to the bargaining processes of the RLA. This result flows directly from the language of the duration clause in the agreement. It is also supported by the undisputed evidence (relied on below) indicating that the parties believed their contract to be an amendable contract which did not terminate. The interpretation of the duration clause urged by TWA would make significant portions of its language meaningless.

2. The RLA does not allow a carrier to achieve through self-help that which it did not submit to the bargaining processes of the Act calling for notice, negotiation, mediation, and proffer of arbitration prior to self-help. This result is mandated by the plain language of § 2 Seventh of the Act, as this Court held in *BRAC v. FEC Railway Co.*, 384 U.S. 238 (1966). In *FEC*, the Court ruled that it would defeat not only the specific mandate of § 2 Seventh, but the spirit of the Act, if the carrier were allowed during self-help to make changes it had never brought to the bargaining table. A contrary holding

would give a carrier an incentive to engage in self-help, and tempt it to provoke a strike on certain issues so that it could then make other sweeping changes which it had not subjected to the Act's procedures, and annul the entire collective bargaining agreement. That in fact is precisely what happened in this case.

Section 2 Seventh was not part of the Act as originally legislated, but was a specific amendment enacted in 1934. The amendment had the effect of balancing the Act's scheme by assuring that both the carrier and union are limited in their exercise of self-help by the scope of their balancing propcsals. The union is limited to striking in order to secure a collective bargaining agreement consistent with its proposals made in its § 6 Notice; and the carrier is limited in the unilateral changes it may make by the scope of its § 6 Notice. Thus, neither the carrier nor the union may achieve through self-help that which it did not submit to the processes of the Act.

TWA's attempts to distinguish *FEC* are unpersuasive. It is not plausible to believe that *FEC* is based upon the "fact" that the contracts there were all of indefinite duration. First, the duration of the contracts has absolutely nothing to do with the Court's rationale as to why the carrier should not during self-help be allowed to implement that which it has never submitted through the § 6 procedures. Second, the Court did not articulate any such limitation. It is quite difficult to believe that the Court would base its rationale entirely on peculiar language in the collective bargaining agreements without specifically so stating, particularly where the Court did say that the case centered upon § 2 Seventh and quoted § 2 Seventh. Third, it is far from clear that the distinction claimed by TWA exists. The FEC contracts were thought to be of so little consequence that most of them were not placed in the record before the Court. Moreover, the language of the only duration clause located

from the *FEC*'s contracts is in fact quite similar to the IFFA-TWA duration clause.

No case supports TWA's position except *IAM v. Reeve Aleutian Airways, Inc.*, 469 F.2d 990 (9th Cir. 1972), *cert. den.*, 411 U.S. 982 (1973). The Ninth Circuit opinion, however, gives no consideration to the rationale of *FEC* or the specific language of § 2 Seventh. *Reeve* also seems to miss the point when it states that the Act concerns itself with "changes in agreements"; § 2 Seventh concerns itself primarily with *unilateral changes* by the carrier where there is *no agreement* to change, as *FEC* makes clear.

Directly contrary to *Reeve* (in addition to the decisions below) are *EEOC v. United Air Lines*, 755 F.2d 94 (7th Cir. 1985), and *Cox v. Northwest Airlines*, 319 F.Supp. 92 (D. Minn. 1970). Other cases cited by TWA do not in fact support TWA's position. Except for *Reeve*, no court uses the word "expire" in connection with an RLA contract in the manner in which TWA would use that word; i.e., the contract expires so as to allow the carrier to make any and all changes at will once the self-help period begins.

It would make a sham of the bargaining and mediation processes of the RLA to allow TWA to unilaterally achieve what the Act requires be done by the other orderly procedures. The goal of the RLA is to have the parties submit the changes they wish to make to the elaborate processes of the Act in the hope that self-help may be avoided. The result urged by TWA would clearly defeat this goal.

TWA's theory that pursuant to § 2 Eleventh the Act contains a special rule as to how a union security agreement may be abrogated is without basis. This theory assumes there is no contract, when in fact there is a contract. It also assumes that a union security provision is not a working condition subject to § 2 Seventh, when

in fact the Court held the opposite in *FEC*. Nor is there anything in the legislative history of § 2 Eleventh or in the words of the statute itself which supports TWA's position. Analogies drawn to NLRA case law based upon an entirely different statutory bargaining and self-help scheme, and quite different contracts, are simply unfounded.

ARGUMENT

Preliminary Statement

Attempting to respond to TWA's brief is difficult for three reasons.

1. TWA's "Question Presented" is inaccurate and incomplete. One critical fact is simply misrepresented: the collective bargaining agreement is *not* for a "stated term," since both the district court and the court of appeals held that the contract was an amendable contract which did not terminate. A second crucial fact is just ignored: the unilateral changes at issue here were never made the subject of bargaining by TWA.

2. From its highly argumentative Statement Of The Case forward, TWA's brief represents a radical shift in position from the basis upon which this action was litigated in the lower courts. Indeed, TWA seems determined to do all that it can to avoid having this Court rule on the basic issue upon which this case has been litigated from the outset: may a carrier utilize self-help to achieve changes which it would not submit to the bargaining processes of the RLA? What was a very secondary argument for TWA in the lower courts is now its primary focus: a change in a union security provision is somehow exempt from the mandatory processes of the Act requiring that changes in terms governed by agreements be the subject of notice, negotiation, and mediation. However, if one reads TWA's brief closely, the position TWA has taken from the outset of this litigation is still apparent: once the self-help period begins,

the carrier may change any and all working conditions at will, without regard to what changes have been the subject of negotiations.

3. Although TWA is clearly unhappy with the determination that the contract in fact was not for a stated term and did not terminate, it never squarely presents that issue for this Court's review. The undisputed evidence relied upon below in regard to the parties' own interpretation of their contract is not even mentioned by TWA.

As is obvious from our Statement of the Case, this litigation was not tried upon a narrow ground. TWA's complaint reflects that it wanted the court to declare that the agreement had expired and that TWA was not bound by it. IFFA's Answer and Counterclaim clearly stated that the contract had not expired and that TWA could make only those changes which had run the statutory gauntlet, and asked the court to issue a declaratory judgment to this effect. The court did. Both lower courts framed the issue in broad terms as to whether the contract survived, both under the contract itself and under the statute.[5] The briefs and oral arguments below discuss the contract survival issue in great detail, and the district court noted as much at the very outset of its opinion. (Pet. App. 31a).[6] Evidence was presented re-

[5] As a practical matter, at the time this case was being litigated before the district court, TWA was treating the contract in its entirety as non-existent and refused to allow union officials routine access to property and necessary information in order to enforce the contract. Accordingly, as TWA is well aware, IFFA had no way of knowing what all of TWA's illegal unilateral changes were. This, of course, necessitated that IFFA ask the court to declare in broad terms that the contract survived and that TWA could make only those changes which it had submitted to the processes of the Act.

[6] For example, the heading of the entire Argument section in TWA's brief in support of its Motion for Summary Judgment was:

garding how the parties themselves historically had expressed their belief as to the effect of the duration clause. In short, to claim that this case was somehow litigated upon a "very limited record", as TWA mysteriously contends (TWA Br., p. 38, n.28), is sheer nonsense.[7]

In addition, the determination below that the contract by its terms did not expire is unassailable, which is perhaps why TWA tries so hard to avoid presenting it for review. Moreover, there is nothing in the RLA which allows a carrier to unilaterally abrogate union security provisions (or any other conditions embodied in the collective bargaining agreement) without submitting that change to the processes of the Act. Accordingly, attempting to narrow the issue cannot help TWA.[8]

AFTER MARCH 6, 1986, TWA WAS FREE TO CHANGE THE CONDITIONS IN EXISTENCE WHEN THE AGREEMENT EXPIRED, INCLUDING CONDITIONS THAT HAD NOT BEEN THE SUBJECT OF NEGOTIATIONS

See also the transcript of the oral argument before the district court on July 12, 1986, at pages 4, 9, 17, 18, 44, and 53.

[7] In a brief in related litigation, TWA has recently argued that this Court granted *certiorari* here to consider the issue of whether "[U]nder the RLA, a carrier's unilateral implementation of changes not subject to the RLA's mandatory bargaining processes are unlawful and violative of the Act". (TWA's Reply Suggestions in Support of its Motion to Dismiss, in No. 86-6030, *supra*, filed July 20, 1987, p. 68). In the same brief TWA argues vigorously that its elimination of the grievance procedure, union security provisions, etc. was undertaken in good faith upon advice of counsel. (Those actions are relevant in No. 86-6030 insofar as they reflect upon TWA's good faith, or lack of it, in attempting to reach a new agreement with IFFA).

[8] In regard to other litigation between these parties which has not as yet reached this Court, space does not allow (and nothing at issue in this case requires) that litigation to be adequately summarized here. Suffice it to say (1) the proper time for this Court to concern itself with that litigation is when and if that litigation reaches this Court; (2) should IFFA prevail in all of its claims, all flight attendants will be employed under vastly improved

But the true matter at issue should not be lost amid TWA's obfuscation. The focus in this case is not upon whether there are some flight attendants who crossed a picket line who would rather not pay dues; in fact, the strike was over months before the district court ruled in IFFA's favor. But rather that focus must be upon whether the RLA allows a carrier to achieve through self-help that which it refused to submit to the procedures of the Act. In short, the issue presented is, does the Act require that the employer bargain over that which it intends to change.

I. The Courts Below Correctly Held That The Collective Bargaining Agreement Is An Amendable Contract Which Has Not "Expired"

Throughout TWA's brief we read frequently that the contract "expired by its terms" or is for a "stated term". This is said so often that one perhaps could assume that such matter is an established fact; in actuality, the opposite is true. Both courts below held that the contract is an amendable contract which does not expire. Thus, during self-help, TWA may, pursuant to the contract, unilaterally implement only those changes which it has subjected to the RLA's bargaining process; all other portions of the contract remain in effect. This result is obviously sound, based not only upon the language of the duration clause but also upon the undisputed bargaining history.

There is no basis upon which this Court should disturb this determination. This Court has said that ques-

---

working conditions, and crossover flight attendants are among those who will receive substantial amounts of backpay; and (3) because of the orders issued thus far in *this* litigation, all currently working flight attendants (including crossovers and replacements) are not employees at will, their seniority rights may not be unilaterally abrogated at TWA's whim, and those employees have the benefit of a grievance procedure which provides *inter alia* for review by a neutral arbitrator of employee discipline and discharge.

tions regarding the parties' intent are questions of fact. *Pullman-Standard v. Swint*, 456 U.S. 273, 288-289 (1982). Findings of fact by the district court pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, which are subject to the clearly erroneous standard of review, include findings based upon documentary evidence. As the notes to that rule make clear, such findings include facts deduced or inferred from uncontradicted evidence. The courts of appeal routinely hold that where a district court refers to extrinsic evidence in order to interpret a contract, the district court's interpretation is a finding of fact subject to the clearly erroneous rule. *See Kern Oil & Refining Co. v. Tenneco Oil Co.*, 792 F.2d 1380 (9th Cir. 1986), *cert. den.*, —— U.S. ——, 107 S.Ct. 1349 (1987); *Texas Commerce Bank National Association v. National Royalty Corp.*, 799 F.2d 1081 (5th Cir. 1986); *John F. Harkins Co., Inc. v. The Waldinger Corp.*, 796 F.2d 657 (3rd Cir. 1986), *cert. den.*, —— U.S. ——, 107 S.Ct. 939 (1987). Accordingly, there is no need to look further; this Court "[C]annot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error". *Goodman v. Lukens Steel Co.*, —— U.S. ——, 107 S.Ct. 2617, 2623 (1987), *quoting Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949).

The duration clause does not use the word "expire" or any word with remotely similar effect. The parties surely could have said expire if they meant expire. As the district court noted, "This is not the kind of clause where the parties are likely to have planted intentional ambiguities in order to paper over differences." (Pet. App. 40a, n.9). To the contrary, the duration clause provides that the contract renews itself indefinitely *without change* unless notice of *intended change* is given in the form of a § 6 Notice, which in turn triggers the statutory bargaining process. It is bizarre to contend, as TWA does, that the parties intended that a § 6 Notice of specified intended changes would be utilized as a

method of allowing TWA to implement whatever changes it wished, without regard to what changes had been subjected to the procedures of the Act. By TWA's logic, the words "without change" are rendered meaningless, and "entire" is redundant. According to TWA, notice of a single intended change causes the entire agreement to self-destruct. But the language does not cause termination; it only forces utilization of § 6.

More is not needed, but there is more. The undisputed evidence discloses that at the bargaining table the parties mutually referred to "amendable dates" and the agreement "becoming amendable" and never referred to the contract "expiring" or "terminating". Even TWA's § 6 Notice and proposals refer to modifications and changes, not expiration or termination. *See* Pet. App. 8a, 9a, 40a, 41a; J.A. 28, 29, 38.[9]

TWA's expiration theory, of course, is premised entirely on the questionable assumption that all of the contracts involved in *FEC* were radically different (in their duration language) from the contract here. However, the language of the only duration clause we have been able to locate from any of the contracts involved in *FEC*, is in fact not so different from the IFFA-TWA language. *See* J.A. 15, 26. The BRAC-FEC contract remains in effect indefinitely "until changed as provided herein or in accordance with the Railway Labor Act", and then goes on to indicate that any party desiring a change must give a § 6 Notice. The IFFA-TWA contract renews itself indefinitely without change unless one party serves a § 6 Notice of intended changes. Accordingly, TWA's claim that the BRAC-FEC contract is radically different from the contract here is reduced to an argument that the parties intended that, by giving a § 6

[9] TWA, which accuses the district court and court of appeals of being disingenuous in this regard (TWA Br. p. 27, n.19), does not mention this evidence in its brief.

Notice of certain specified changes, the contract was to be changed other than as specified in the § 6 Notice, and other than "in accordance with the Railway Labor Act". The inherently specious nature of such logic is self-apparent.

As is also true in regard to the underlying statutory issue, the only case which arguably supports TWA's "expiration" argument is *Reeve*.[10] But as the Eighth Circuit noted, *Reeve* simply seems to have assumed, without actually considering, that the contract there "expired". (Pet. App. 12a-13a). Nor is there any indication in *Reeve* that any evidence regarding the bargaining history and the parties' intent was offered, in stark contrast to the record here. In addition, every court since *Reeve* which has discussed its specific holding has openly questioned the factual determination that the contract there expired by its terms. *See EEOC v. United Air Lines*, 755 F.2d 94, 98 (7th Cir. 1985); Pet. App. 12a, 37a, n.7.[11] And while the duration clauses are similar, the *Reeve* contract does not contain the word "entire" which the courts below found to be significant.

Accordingly, TWA's oft-repeated cry that the courts below have rewritten the contract is no more than hyper-

[10] As will be discussed in more detail *infra*, cases which use the word "expire" in the context of saying that a contract expired so as to allow the parties to reach the status quo period, or the self-help period, are inapposite. *Reeve* is the only case that even suggests that once the self-help stage begins, the carrier may change any and all working conditions at will.

[11] In response to the holding in *Reeve* that the contract there expired and the employer was not bound by any of its terms, the Seventh Circuit in *EEOC* said "A more plausible interpretation is that the specification of an expiration date bars the employer from issuing a Section 6 Notice designed to take effect before then." 755 F.2d at 98. The district court here said that "The contract in *Reeve* was assumed to provide a termination date, but the language does not unmistakably prevent partial survival of contract terms." Pet. App. 37a, n.7.

bolic rhetoric. As the Eighth Circuit made clear, it is TWA who wishes to have the courts rewrite Article 28. (Pet. App. 17a). The result TWA seeks cannot be discerned from the language of the contract or from the undisputed evidence regarding the parties' intent.[12]

II. Under The RLA, A Carrier May Not Achieve Through Self-Help That Which It Did Not Submit To The Processes Of The Act

A. §2 *Seventh Controls*

This case, like *BRAC v. FEC Railway Co.*, 384 U.S. 238 (1966), is about an attempt by a carrier to implement during self-help that which it did not submit to the mandatory processes of the RLA, requiring notice, negotiation, mediation, proffer of arbitration, and ultimately release to engage in self-help.[13] As the district court noted, and as the Supreme Court said in *FEC*, this case centers upon § 2 Seventh of the Act (45 U.S.C. § 152 Seventh), which states:

> No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements

[12] TWA has not (before this Court) suggested that the contract expiration issue be arbitrated. It simply and repeatedly contends that the unambiguous meaning of Article 28 is precisely the opposite of what the district court and court of appeals found it to be. In any event, issues which deal with the existence of a contract *per se* are properly decided by the district court. *AT&T Technologies v. CWA*, 475 U.S. 643, 106 S.Ct. 1415 (1986). This is acutely true here, since TWA's position is and has been that there is no contract, and consequently there is no grievance procedure under which or System Board before which such an arbitration could take place.

[13] The RLA's procedures for resolution of major disputes which must be followed *prior* to the exercise of self-help were summarized in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969).

except in the manner prescribed in such agreements or in section 156 of this title.

It is important to note that the prohibition of § 2 Seventh is directed at changes in *conditions* (as embodied in agreements), not merely changes in agreements. This provision, then, obviously encompasses what unilateral changes a carrier may make during self-help. Thus, working conditions, contained in a collective bargaining agreement, may not be altered without either an agreement requiring change, or utilization of § 6 and the bargaining processes of the RLA. Here, obviously there is no agreement to change, and as to the matters at issue in this litigation, the procedures triggered by § 6 have not been invoked. Simply put, as *FEC* confirms, a carrier may not achieve through self-help that over which it did not bargain.

The dispute in *FEC* clearly focused upon the carrier's implementation during self-help of unilateral changes which had not been the subject of negotiation and mediation:

> If all that were involved were the pay increase and the notice to be given on layoffs or job abolition, the problem would be simple. The complication arises because the carrier, having undertaken to keep its vital services going *with a substantially different labor force*, finds it necessary or desirable to make other changes in the collective bargaining agreements. (384 U.S. at 245, emphasis in original).

The Court went on to state that:

> Thus we find FEC in this case anxious to exceed the ratio of apprentices to journeymen and the age limitations in the collective bargaining agreements, to make changes in the contracting-out provisions, to disregard requirements for trained personnel, to discard craft and seniority restrictions, the *union shop provision*, and so on. *Each of these technically is included in the words "rules, or working conditions*

> *of its employees, as a class as embodied in agreements" within the meaning of § 2 Seventh of the Act.* It is, therefore, argued with force that each of these issues must run the same gantlet of negotiation and mediation, as did the pay and notice provisions that gave rise to the strike. (*Id.*, emphasis supplied).

After stating that the carrier could implement (temporarily) some changes over which there had been no bargaining, if those changes were necessary in order to continue operations during a strike, the Court went on to hold that:

> At the same time, any power to change or revise the basic collective agreement must be closely confined and supervised. These collective bargaining agreements are the product of years of struggle and negotiation; they represent the rules governing the community of striking employees and the carrier. That community is not destroyed by the strike, as the strike represents only an interruption in the continuity of the relation. Were a strike to be the occasion for a carrier to tear up and annul, so to speak, the entire collective bargaining agreement, labor-management relations would revert to the jungle. A carrier could then use the occasion of a strike over a simple wage and hour dispute to make sweeping changes in its work-rules so as to permit operation on terms which could not conceivably have been obtained through negotiation. Having made such changes, a carrier might well have little incentive to reach a settlement of the dispute that led to the strike. It might indeed have a strong reason to prolong the strike and even break the union. The temptation might be strong to precipitate a strike in order to permit the carrier to abrogate the entire collective bargaining agreement on terms most favorable to it. The processes of bargaining and mediation called for by the Act would indeed become a sham if a carrier could unilaterally achieve what the

Act requires be done by the other orderly procedures. (384 U.S. at 246-7, footnote omitted).[14]

These words were meant for this case. Once the strike began the carrier did indeed treat the collective bargaining agreement as a nullity. TWA did make sweeping changes which it had never submitted to the processes of the Act. TWA's position was (and is) that it could change any and all working conditions at will. Having thus obtained far more from self-help than it had proposed during negotiations, the carrier indeed had little or no incentive to settle. TWA had already chosen to "abrogate the entire collective bargaining agreement on terms most favorable to it".

B. *The Role Of § 2 Seventh In The Scheme Of The RLA*

As noted by the district court, § 2 Seventh was not a part of the Act as originally passed in 1926, but instead was part of the 1934 amendments. When added, § 2 Seventh had a rather obvious balancing effect upon the rights of the parties during self-help. A union, after all, was always clearly limited in its exercise of self-help by the scope of its bargaining proposals. A union cannot make a unilateral change, it can only strike in order to secure a new agreement; and any proposals for a new agreement must be processed through § 6.

The carrier, however, was not so limited by the original text of the Act. The carrier did not have to reach a new agreement, and *could* [nonetheless] make a unilateral change. Thus, a carrier could achieve through self-help that which it did not submit to the processes of the Act. The major purpose of the Act, however, was to encourage bargaining and prevent strikes. *Texas and*

[14] If TWA's arguments are to be accepted, one must assume that at this precise point in the opinion Justice Douglas would have been willing to add the following sentence: "All that we have just said is completely irrelevant if the collective bargaining agreement contains a duration clause with a fixed term."

N.O.R. Co. v. BRAC, 281 U.S. 548, 565 (1930); *Detroit and Toledo Shoreline R.R. Co. v. UTU*, 396 U.S. 142, 148 (1969). Allowing the carrier an incentive to engage in self-help (by allowing it to unilaterally implement that which it never proposed) was hardly consistent with this purpose. The addition of § 2 Seventh made it clear that during self-help a carrier could make only those unilateral changes which were consistent with the matters it had subjected to the § 6 procedures. Thus, a carrier and a union are now (and have been since 1934) equally limited in their exercise of self-help by the scope of their bargaining proposals. "Only if both sides are equally restrained can the Act's remedies work effectively." *Detroit and Toledo, supra*, 396 U.S. at 155.

If one would read § 2 Seventh out of the Act and ignore the thrust of *FEC*, as TWA would have the Court do, the entire structure of the RLA breaks down. A § 6 Notice, after all, is of relatively limited use if when the self-help period begins the carrier may make any changes it wishes, without regard to what matters were the subjects of its § 6 Notice. The NMB is rendered virtually impotent, because while it may spend (as in this case) literally years discussing with the union and the carrier the matters encompassed by this § 6 Notice, the union and the NMB do not know what the carrier's true agenda really is and what the carrier might hope to gain through self-help. In addition, a carrier would have no incentive to engage in interest arbitration pursuant to § 5; for the carrier would know that even if the arbitrator gave the carrier everything possible, and adopted the carrier's bagaining poposals in their totality, the carrier could achieve still more through self-help. A Presidential Emergency Board pursuant to § 10 would also be rendered ineffective, because while the parties are engaging in an additional cooling off period awaiting the findings of a Presidential Emergency Board, those findings would

not address what the carrier really hoped to gain through self-help.[15]

Fortunately, the procedures of the Act cannot be so easily sidestepped. As the district court said, the parties cannot "opt out" of the bargaining process. That clearly is the purpose of § 2 Seventh, and that clearly is the lesson of *FEC*. As the United States said in its brief to this Court in *FEC*:

> In 1934, when Congress undertook to strengthen both the mandatory and voluntary features of the Act, it added Section 2, Seventh, which flatly, and without qualification, broadly forbids carriers to change the rates of pay, rules and conditions of its employees in any manner other than set forth in the agreements or in Section 6 of the Act. Thus, the statute now not only negatives changes during statutory negotiations, but it also states affirmatively that changes may only be made *through* negotiation. (Brief of the United States before the Supreme Court in *FEC*, p. 26, emphasis in original).

TWA, as it has throughout this litigation, chooses to say as little as possible about § 2 Seventh, and indeed discusses it only in one footnote (TWA Br. p. 41, p. 29). At no point does TWA bother to respond to the findings of the district court in regard to the purpose and effect of § 2 Seventh. The short non-explanation of § 2 Sev-

[15] TWA's position regarding § 2 Seventh, which seems to be that it was added to the act merely to state that contracts are enforceable, is nonsensical. Justice White's dissent in *FEC* (which for the purposes of this case is not inconsistent with the majority) states without any qualification that "The Court agrees that § 2 Seventh forbids the carrier itself to make any changes in the contract other than those on which bargaining has taken place. . . ." 384 U.S. at 249. He also characterizes the language of § 2 Seventh as "unequivocal" (*Id.*), and states that the "[R]ailroad was free to operate, but the Congress *specified* in § 2 Seventh the terms on which it might do so." (384 U.S. at 250, emphasis supplied). No hint is given that this unequivocal, specific mandate applies only to contracts of indefinite duration.

enth TWA offers would render it virtually meaningless, let alone explain why Congress felt it necessary to add § 2 Seventh as a specific amendment in 1934.[16] Moreover, the notion that TWA has only made changes *in the manner prescribed* by Article 28 is strange indeed. "Prescribed" means required, or mandated, or dictated. Even if Article 28 could be given the highly dubious construction which TWA attributes to it, (i.e. that the contract expired), nothing in Article 28 *requires* TWA to unilaterally abrogate the contractual grievance procedure, the union security provisions, or any provision. The mere fact that the parties have been unable to agree upon changes does not mean that they have mandated that the carrier be allowed to make changes at will.

Quite helpful, on the other hand, is TWA's quotation from *Detroit and Toledo*.[17] Section 2 Seventh indeed "states one category of cases in which [the statutory] procedures must be invoked". 396 U.S. at 156. In other words, if the carrier wants to make changes in contractually-governed working conditions, it *must* process those specific changes through the procedures triggered by § 6. And yes, changes in conditions governed by agreements can only be made "by the statutory procedures". *Id.*[18]

[16] Conditions "embodied" in contracts remain so even if the contract arguably expires. If Congress had meant to say § 2 Seventh forbids changes in contracts *which have not expired* it certainly could have said so in plain English.

[17] *Detroit and Toledo* did not deal with what changes could be made during self-help. It only dealt with whether during the status quo period prior to release a carrier could make changes in conditions not governed by a collective bargaining agreement.

[18] Just as enlightening is the discussion in *Detroit and Toledo* regarding another of the 1934 amendments. *See* 396 U.S. at 152, n.19, where the Court discusses the change in § 5 adding the 30-day cooling off period following NMB release. As the law was enacted in 1926, the carrier could make unilateral changes immedi-

The Court in *Detroit and Toledo* also made it quite clear that the prohibition contained in § 6 is *not* the same prohibition contained in § 2 Seventh. *Id.* Section 6 prohibits changes in working conditions "broadly conceived", (396 U.S. at 153), which includes working conditions not specifically contained in agreements. Section 2 Seventh, however, is expressly limited to changes in conditions embodied in agreements. Thus, to accept TWA's arguments regarding the lack of import of § 2 Seventh, one must believe that when Congress added § 2 Seventh to the RLA in 1934 it was not engaging in an exercise of mere redundancy; it was engaging in an exercise of *partial* redundancy, since by TWA's logic § 2 Seventh repeats part, but not all, of § 6. A more rational interpretation would be that § 2 Seventh is intended to supplement rather than repeat § 6; and that while § 6 forbids changes in working conditions until the NMB has had an opportunity to mediate the dispute, § 2 Seventh makes it clear that during self-help the only

---

ately following NMB release, even before the President could act to further maintain the status quo under § 10. The Court quotes Joseph B. Eastman, principal author of the 1934 amendments, as stating that, "The change now proposed is designed to plug this hole". Hearings on S. 3266 before the Senate Committee on Interstate Commerce, 73rd Cong., 2d Sess., 21 (1934). Although there is no detailed discussion in the legislative history of the purpose of adding § 2 Seventh in 1934, at the beginning of his testimony Mr. Eastman said:

> This Railway Labor Act has now been tried for a period of nearly 8 years. It has served a very useful purpose and has brought about many good results, but experience has shown that it is in need of improvement. The bill before you, S. 3266, proposes such improvements. It does not depart from the general principles of the present Railway Labor Act, but, instead, is designed to reinforce those principles and provide for their more effective application. It seeks not to overturn but to perfect what has been done. (*Id.* at 10.)

Given the clear language of § 2 Seventh and its balancing effect upon the statutory scheme, the conclusion is inescapable that § 2 Seventh was also designed to plug a hole in the Act.

changes which the carrier may implement are those as to which the NMB did have an opportunity to mediate. Simply put, a carrier may not during self-help achieve that which it did not submit to the processes of the Act.[19]

C. *FEC Is Not Distinguishable*

TWA's position in this case is entirely dependent on its peculiar theory that the decision in *FEC* was based solely upon the purported fact that the contracts at issue there did not "expire" but were of indefinite duration. All airline contracts expire, says TWA, but no railroad contracts do. There are, however, a number of difficulties with this theory.

First, the alleged distinction TWA hopes to draw has nothing to do with the Court's rationale. The contract at issue here has evolved over 40 years of collective bargaining, much like the *FEC* contracts that were "the product of years of struggle and negotiation". TWA did use the strike as the "occasion" for it to "tear up and annul, so to speak, the entire collective bargaining agreement . . . ." If TWA's position is upheld here, a carrier will be able to utilize the "occasion of a strike over a simple wage and hour dispute to make sweeping changes in its work rules so as to permit operations on terms which could not conceivably have been obtained through negotiation." Without question the ability to obtain through self-help that over which the carrier did not bargain could affect the carrier's desire to precipitate

---

[19] Nor is TWA aided by out-of-context statements made by this Court or other courts to the effect that the Act is "silent" as to what is to happen during self-help. Clearly, *FEC* places *some* limitation upon a carrier's rights during self-help, as was explicitly recognized by the Court earlier this year in *Burlington Northern, infra*, where the Court also said that "[T]he RLA does not contain an express mandate limiting the scope of self-help available *to a union* once the RLA's major dispute resolution procedures have been exhausted." (107 S.Ct. at 1851, emphasis supplied).

a strike, or its interest in settlement once the strike had begun. And if the carrier can so easily sidestep the elaborate machinery of the Act, merely by waiting until self-help to implement that over which it will not bargain, the processes of bargaining and mediation called for by the RLA have indeed become a sham.

None of this has anything to do with whether a contract is of fixed or indefinite duration. Instead it involves an interpretation of the RLA which would give a carrier an *incentive* to engage in self-help. That is what must be avoided "if the spirit of the Railway Labor Act is to be honored." *FEC*, *supra*, 384 U.S. at 247. As Judge Larson said in *Cox v. Northwest Airlines*, 319 F. Supp. 92 (D. Minn. 1970), in rejecting the same arguments TWA makes today:

> The Supreme Court (in *FEC*) nowhere in the opinion even mentioned—much less relied upon—this alleged peculiarity of railroad collective bargaining agreements. What is more, the arguments advanced by this Court for protecting the integrity of the collective bargaining agreement and the parade of horrors which the Court feels would result from a failure to do so are not dependent upon or affected in any manner by an interpretation of the duration clause of the collective bargaining agreement. (319 F.Supp. at 98.)

The court went on to state that:

> It can hardly be seriously asserted that the "spirit" of the Act is determined by language selected by the draftsmen of duration clauses in collective bargaining agreements. (*Id.*).

Indeed the "spirit of the Act" is not "that existing agreements be honored". (TWA Br. p. 33). Although that may well be a laudable notion, the spirit of the Act is a bit more sophisticated. The purpose of the Act as clearly set forth in § 1(a) [45 U.S.C. § 151(a)] and emphasized by the Eighth Circuit here (Pet. App. 5a),

is to promote collective bargaining to the fullest extent possible in order to avoid strikes. To comply with this objective (which applies equally to railroads and airlines), the parties must utilize the elaborate machinery of the Act as to the changes they wish to make. Otherwise, that machinery has no opportunity to work.

A second problem with TWA's theory is that Justice Douglas simply did not articulate the limitation TWA wishes to place upon *FEC*. TWA asks the Court to accept on faith alone that references to "existing agreements" in all instances must mean "agreements of indefinite duration", without any explanation whatsoever of why an agreement like the IFFA-TWA agreement could not be characterized as an "existing agreement"; and further asks the Court to accept that this hidden meaning was the unspoken basis for *FEC*'s forceful language regarding implementation of changes which had not been the subject of bargaining. It strains credulity to believe that the Court would base its rationale entirely upon the peculiarity of duration clauses in the contracts without clearly so stating, and without specifically enunciating what that language was. By contrast, the Court did find it necessary to quote § 2 Seventh. We submit that if the case centered upon particular contractual language, the Court would have said so and would have identified that language. However, if the decision turned upon § 2 Seventh, the Court would have said, as it did, that the "[C]ontroversy centers around § 2 Seventh of the Act". 384 U.S. at 243.

The Court in *FEC* also characterized the contracts as "outstanding" (384 U.S. at 241), "earlier" (384 U.S. at 247, n.7), and "basic" (384 U.S. at 246), all of which are consistent with the result below. Interestingly, the Court recently characterized the *FEC* contracts as "*pre*-existing", a term which unquestionably would encompass the IFFA-TWA contract. *Burlington Northern Railroad Company v. Brotherhood of Maintenance of Way Em-*

ployees, —— U.S. ——, 107 S.Ct. 1841, 1853, n.14 (1987) (emphasis supplied).

In addition, an examination of the record in *FEC* demonstrates that the contracts themselves were thought to be of so little consequence that most of them were not even part of the record before the Court. J.A. 15, 16 (only 4 of the 11 contracts were a part of the Supreme Court record). Not knowing what those contracts said, and knowing that the Court did not know what those contracts said when it issued its opinion, it is extremely difficult to believe that the opinion turned upon language in those contracts.

All of which brings us to a third reason why TWA's argument is on very shaky ground: it is not even clear what the record in *FEC is*. We most pointedly disagree with TWA's statement that the briefs in *FEC* repeatedly emphasize the duration language in the contracts (TWA Br. p. 31, n.22). The subject is barely mentioned, and the most specific references appear to be from briefs of *amici*, not of the parties.[20] If the case turned upon this language, surely the parties would have not just mentioned, but stressed it. Even the district court in *Reeve*, said:

> Although it is *not entirely clear* from the language of the opinion, it *appears* that the underlying collective bargaining agreement had not expired. (330 F.Supp. at 334, emphasis supplied.)

"Not entirely clear" appears to be an understatement.

As noted previously (p. 15), the one duration clause we were able to unearth from the *FEC* contracts contains language not at all dissimilar to the IFFA-TWA contract. Both clauses provide that the contract renews itself indefinitely unless and until a § 6 Notice is issued. The main distinction seems to be that in the IFFA-TWA contract, the § 6 Notice may not specify changes intended to take effect before a date certain, whereas in the BRAC-FEC contract there are no such restrictions. Thus, what Article 28 seems to establish is a "moratorium" on the effective date of changes proposed in a § 6 Notice, consistent with the manner in which TWA has repeatedly contended that typical railroad contracts are structured (J.A. 48-49).[21]

[20] Apparently there is *no* mention of the duration of the contracts in the briefs of the unions who were parties in *FEC*. The unions were the parties who would have the most to gain by stressing this point (if TWA's theory is correct).

The lack of emphasis in the record, the briefs, and the Court's opinion regarding the language of the contracts leads inevitably to the conclusion that the Court and the parties believed it was the statute, and not the contracts which controlled. As the district court noted here, "It would have been quite simple, (however), to avoid giving the eloquent lecture about the purposes of the Act if the Court has viewed the agreement between the parties as the controlling factor". (Pet. App. 35a). Moreover, in *Burlington Northern R.R. Co. v. Brotherhood of Maintenance of Way Employees*, —— U.S. ——, 107 S.Ct. 1841 (1987), the Court said the following about *FEC*:

> [T]he Court's task was to construe the scope of the employer's right to self-help *with reference simply to the RLA itself*. The Court's conclusion—that a

[21] A case cited by TWA, *Brotherhood of Railroad Trainmen v. Akron & Barberton Belt Railroad Company*, 385 F.2d 581 (D.C. Cir. 1967), *cert. den.*, 390 U.S. 923 (1968), uses the phrase "common indefinite or *automatic self-renewal* term" in discussing the typical railroad collective bargaining agreement upon which TWA's entire argument is based. (385 F.2d at 596, emphasis supplied). "Automatic self-renewal" perfectly describes Article 28 of the IFFA-TWA contract. The difference TWA claims exists between railroad and airline contracts is apparently fictitious; at least it is not revealed by any of the cases TWA cites. Nor is there any basis in the statute for such a distinction. In § 201 of the Act (45 U.S.C. § 181) Congress specifically chose to make the entire Act (except for § 3) applicable to airlines.

right to deviate from the requirements of § 2 Seventh was essential lest the employer's right to self-help become "academic"—*was one that rested solely on a construction of the RLA.* (107 S.Ct. at 1853, n.14) (emphasis supplied).

A result reached "with reference simply to the RLA itself", and that turns "solely on a construction of the RLA" is not a result that turns upon peculiarities in particular collective bargaining agreements. Nor is there any basis to believe that result is based upon a legendary (but unsubstantiated) difference between railroad and airline contracts. The distinction upon which TWA's arguments are premised does not exist.

D. *The Case Law: Reeve Stands Alone As Support For TWA*

The only case which gives any support to TWA's position, either that airline contracts routinely "expire" and are of no further effect, or that the RLA allows "comprehensive termination dates" where contracts completely self-destruct upon notice of specified intended changes, is the Ninth Circuit decision in *IAM v. Reeve Aleutian Airways, Inc., supra*, 469 F.2d 990 (1972). As mentioned previously, the district court in *Reeve* had reached a rather tentative conclusion that the contracts in *FEC* were different from the IAM-Reeve contract. The Ninth Circuit affirmed this distinction in rather sweeping terms, saying *FEC* "[D]ealt with a contract that had no termination date and that continued in force until a new contract had been reached". 469 F.2d at 993.[22] As also mentioned, both the district court and the Ninth Circuit in *Reeve* seem to have assumed, without actually considering, that the contract there "expired by its own terms", a point which has sorely troubled each court that has subsequently had occasion to discuss the specific holding in *Reeve*.[23] After a strike was called, and later

[22] As noted earlier, *FEC* involved not one, but many contracts.

[23] See n. 11, *supra*.

abandoned, the union contended that the carrier could implement changes only in those matters which had been submitted to "the statutory procedure of notice, negotiation and mediation". *Id.* In rejecting this argument, the Ninth Circuit said:

> But this is not what the Act says. The Act is concerned with procedures to be followed respecting proposed *changes in agreements.* (469 F.2d at 993, emphasis in original).

This statement misses the point: the emphasis in *FEC* and in § 2 Seventh is not upon changes in agreements, it is upon changes *where there is no agreement to change.* In other words, the question is what may a carrier unilaterally implement, and when. The statute does not prohibit changes in agreements (which obviously cannot be done unilaterally), but rather prohibits changes in conditions embodied in agreements, unless (there is a new agreement or) those changes have been submitted to the § 6 procedures. *Reeve*'s misdirected focus explains why it stands alone as support for the position espoused by TWA.

In addition, *Reeve* makes absolutely no attempt to deal with the rationale of *FEC*, or explain why the precise language of a duration clause could have altered the Court's holding. And while the text of § 2 Seventh is quoted in its entirety in both the district court and Ninth Circuit opinions, no effort is made in either to explain what § 2 Seventh means or how it applies to that case.

As the district court noted, the only cases (prior to this case) which carefully consider the lesson of *FEC* are *Cox v. Northwest Airlines, supra*, 319 F.Supp. 92 (D. Minn. 1970), which predated *Reeve*, and *EEOC v. United Air Lines, supra*, 755 F.2d 94 (7th Cir. 1985). As already noted, *Cox* flatly rejected the "duration clause" argument later accepted in *Reeve*.[24] In *EEOC*,

[24] Suprisingly, *Cox* is not mentioned in *Reeve*. Nor is it mentioned by TWA here, even though both the district court and

the Seventh Circuit openly disagreed with *Reeve*, stating: [25]

> The end of the cooling-off period does not terminate the collective bargaining agreement any more than the formal expiration date in the agreement does; it just allows the employer to make the changes proposed in the section 6 notice. We find too metaphysical for our taste the argument that the agreement terminates on the date specified in the contract even though the employer cannot on termination make any changes. What he cannot change, after all, is the terms of the contract; realistically he continues subject to it, notwithstanding the arrival of the "termination" date; realistically, the contract remains in force. 755 F.2d at 97.[26]

Beyond *EEOC* and this case (which both disagree with *Reeve*), the only officially published opinions which cite *Reeve* are *IAM v. Aloha Airlines*, 776 F.2d 812 (9th Cir. 1985), and *IAM v. Northeast Airlines*, 536 F.2d 975 (1st Cir.), *cert. den.*, 429 U.S. 961 (1976). TWA argues that both of these cases support its position, but neither truly does. In *Aloha*, the Ninth Circuit did cite its earlier opinion ir *Reeve* and did refer to a "termination date".

Eighth Circuit cited it with approval. Moreover, *Cox* held that the airline's action in refusing to abide by the union security provisions (after self-help had begun but where those provisions had not been subject to bargaining) were illegal not only for the reasons articulated in *FEC*, but also as a violation of § 2 Fourth of the Act. A similar result can be inferred from language of the Seventh Circuit in the recent decision in *ALPA v. United Air Lines, Inc., infra*, 809 F.2d 886, 898-900. Thus, § 2 Fourth provides an equally applicable basis for affirming the result below.

[25] Interestingly, in *EEOC* it is the *carrier* who argued that it could not change and was bound by the terms of the collective bargaining agreement over which there had been no negotiations even after the contract "expired".

[26] TWA has repeatedly asserted that this language is dicta. That conclusion is dubious, but dicta or not, the Seventh Circuit is correct.

However, *Aloha* did not deal with what a carrier could do during self-help. Instead, it involved whether the collective bargaining agreement, or an interim agreement which by its terms was due to end, was to be the status quo in effect until the parties received a release from the NMB. Accordingly, the question in *Aloha* was only which of the two agreements the parties had made was to be in effect despite the fact that both had arguably "expired". The Ninth Circuit in *Aloha* had no occasion whatsoever to reexamine the question of whether during self-help a carrier could change working conditions over which it had not bargained.

Northeast dealt with a merger situation, and specifically the question of what obligations the merged airline had to bargain with the union which had represented the employees of the airline absorbed. The citation to *Reeve* is in a footnote at the end of the case which is clearly dicta twice removed (536 F.2d at 978, n.2). In speculating upon whether certain matters might be arbitrable, the court said that, "In general, the terms of a Railway Labor Act collective bargaining agreement are not controlling after the collective bargaining agreement and any subsequent status quo period expire". We do not disagree. It is the collective bargaining agreement *as modified* by any unilateral changes which have properly run the statutory gauntlet of notice, negotiation, mediation, release, cooling-off period, and self-help, that controls.

Other cases cited by TWA do not in actuality support TWA's position, even if such cases use the word "expire" in connection with an RLA contract.[27] The word

---

[27] Two decisions which clearly assume that *FEC* applies to the airline industry, without any discussion of whether or not airline collective bargaining agreements "expire", are *ALPA v. Civil Aeronautics Board*, 502 F.2d 453, 456-457, n.12 (D.C. Cir. 1974), *cert. den.*, 420 U.S. 972 (1975), and *Independent Union of Flight Attendants v. Pan American World Airways, Inc.*, 624 F.Supp. 64, 66 (E.D.N.Y. 1985).

is not used in the context that TWA would give it, i.e. that the contract "expires" so as to allow the carrier to alter any and all working conditions at will, without regard to what the subjects of negotiations have been. Thus, a particular court could say (1) that a contract terminates or expires, but that the statute requires that its conditions remain unchanged; or (2) that the statute extends the life of the contract, despite any dates that may appear in duration clauses in the contract. While it may be interesting to discuss such "metaphysical distinctions", the result of either line of phraseology is the same, "Realistically, the contract remains in force". *EEOC*, *supra*, 755 F.2d at 97; Pet. App. 39a. TWA's arguments to the contrary are wholly clothed in semantics.

Three Second Circuit cases cited by TWA fall into this vein: *Air Cargo, Inc. v. Teamsters Local Union No. 851*, 733 F.2d 241 (2nd Cir. 1984); *ALPA v. Pan American World Airways*, 765 F.2d 377 (2nd Cir. 1985); and *Manning v. American Airlines*, 329 F.2d 32 (2nd Cir.), *cert. den.* 379 U.S. 817 (1964). All three cases deal not with what a carrier may do during the self-help period, but with what the status quo is to be pending NMB release. In *Air Cargo*, the actual practices the union and the carrier were observing were somewhat different from the terms of the written contract. The Second Circuit held that § 6 requires that actual *conditions* in effect remain unaltered during the status quo period; and if (by mutual understanding) the parties had put into effect conditions inconsistent with the written agreement, it is the *conditions* which may not be altered. Indeed, the prohibition of § 6 is directed at changes in conditions, not contracts, and the prohibition of § 2 Seventh is similarly worded.

The *Pan American* case involved a typical collective bargaining agreement and an interim agreement granting certain concessions to the carrier. The concessions

were to be temporary, and the interim agreement explicitly provided that when the status quo period began, the parties were to revert back to the conditions embodied in the original contract. The airline contended that the interim agreement must remain in effect during the status quo period, but the Second Circuit disagreed, holding that the parties could "[B]y *explicit agreement*, provide that temporary and concessionary terms will not be deemed part of the Section 6 status quo". (765 F.2d at 382, emphasis supplied). Thus, conditions otherwise frozen by § 6 (or by § 2 Seventh) may not be altered unless there is an explicit agreement as to what the changes will be. Here, there obviously is no agreement that TWA may at its whim abrogate contractual provisions over which TWA has not bargained.

In *Manning*, the union security provision contained its own duration clause which stated that it was in effect only until a date certain and thereafter was subject to renewal only by mutual agreement. The remainder of the contract contained a duration clause similar to the IFFA-TWA clause. The carrier argued that the parties had agreed that the union security provision would not be in effect during the status quo period. The Second Circuit disagreed, stating that this "argument puts more strain on the words of the check-off agreement than these will bear". 329 F.2d at 34. The court went on to find that a union security agreement pursuant to § 2 Eleventh was clearly a "working condition" as that term is used within the meaning of § 6, and that the check-off agreement was still in effect even though it had "admittedly expired". 329 F.2d at 35. As *FEC* held, a union security agreement is also, of course, a "working condition" within the meaning of § 2 Seventh. 384 U.S. at 245. Thus, even where the language calls for expiration, the life of a union security agreement is extended during the status quo period by § 6. And where there are no

negotiations seeking to alter the union security agreement, it is extended still further by § 2 Seventh.[28]

Yet another case which uses the word "expired" to describe an airline collective bargaining agreement, but does not use the word in the sense in which TWA would like to have it used is *ALPA v. United Air Lines, Inc.*, 802 F.2d 886 (7th Cir. 1986), *cert. den.*, —— U.S. ——, 107 S.Ct. 1605 (1987). As the Eighth Circuit noted, this case does not shed much light on the issues present here, but to the extent that it does the decision clearly supports IFFA. (Pet. App. 11a, n.3). The court did characterize the contract there as one that had "already expired" (802 F.2d at 910), and also accepted the carrier's assertion that the contracts in *FEC* were different (*Id.*).[29] The Seventh Circuit nonetheless applied *FEC* to changes made during the self-help period. 802 F.2d at 898-99.[30]

[28] A fourth Second Circuit case cited by TWA is *FEIA v. Eastern Air Lines*, 359 F.2d 303 (2nd Cir. 1966), a case decided just weeks before this Court's decision in *FEC*. After the Second Circuit decision issued, FEC filed a supplemental brief to bring the new decision to this Court's attention. J.A. 16, 24. Yet this Court chose not to mention *FEIA* in *FEC*. (Why did the railroad think that a case about an airline agreement that "expired" would support its position?) Moreover, *FEIA* is a somewhat confused case and the language upon which TWA relies is clearly dicta; the court had already disposed of the union's claims on other grounds.

It is also worth noting that *FEIA* is the *only* case cited in *Reeve* as precedent for the result reached there. These circumstances provide additional grounds to question the viability of *Reeve*.

[29] In the briefs before the Seventh Circuit in the *United* case, the carrier contended that the contracts at issue in *FEC* were different, and the union did not contest this point; perhaps the union thought that it was not important to the result there, and if so, it was correct.

[30] The notion that the Seventh Circuit in *United* was overruling or implying disapproval of its earlier opinion in *EEOC*, without mentioning *EEOC*, is strained, at best.

Finally, this Court has also recently characterized an RLA contract as one that has "expired". *Burlington Northern, supra*, 107 S.Ct. at 1844. And yet the Court used this word in connection with a typical railroad contract that contained no expiration date, but only a moratorium. *See* Report to the President by Emergency Board No. 209 (Harris, Kasher, and Peterson, members, 1986), p. 4; and Arbitration Award Re Public Law No. 99-431, *BMWE v. Maine Central R.R. Co.*, (Van Wart, 1986). "Expired" is surely a much more definitive adjective than "existing". And yet the Court clearly did not, even by TWA's convoluted logic, use the word "expired" in a fashion so as to imply something quite different from the "existing" agreements present in *FEC*.

E. *The Processes Of Bargaining And Mediation Called For By The Act Would Become A Sham If TWA Is Allowed To Unilaterally Achieve What The Act Requires Be Done By The Other Orderly Procedures*

Running throughout TWA's brief is the preposterous notion that the decisions below have somehow deprived TWA of its right to engage in self-help. In truth, TWA has engaged in and continues to engage in massive self-help, even long after the union has abandoned its strike. The carrier has unilaterally implemented *all* of its bargaining proposals. What is at issue *here* is whether TWA may unilaterally implement that which it has never proposed.

Such a treacherous game of hide and seek is clearly forbidden by the Act, as held in *FEC*. There is absolutely no basis for a different ruling here.[31] The Act clearly requires that the carrier bargain over that which it intends to change. This is hardly "mischievous" or "idiosyncratic" as TWA contends. (TWA Br. pp. 13-14). To

[31] Perhaps what TWA is truly arguing is not that *FEC* is somehow distinguishable but that "Justice Douglas was wrong", as it argued before the district court. J.A. 49, 50.

the contrary, it is the only result which can safeguard the viability of the Act. For if a carrier may so easily sidestep the elaborate machinery of the Act, as TWA did here, the basic purpose of the Act has indeed been frustrated. The entire design of the RLA is to confine and refine a major dispute to its narrowest dimensions. No less than four separate provisions (§ 2 Seventh, § 5, § 6, and § 10) explicitly forbid a carrier to unilaterally change existing conditions, so that the changes the parties wish to make can be the subject of notice, negotiation, mediation, arbitration, and a Presidential Emergency Board, all in the hope that self-help may be avoided. TWA would in essence make these procedures optional for carriers (who could selectively choose which changes to submit to the Act's procedures knowing there are no limitations once self-help begins). Such a result would truly cut the very heart out of the RLA.

The result urged by TWA would also create a drastic imbalance. A union would still be limited to striking in order to secure no more than its bargaining proposals. A carrier, however, could hope to obtain much more through self-help. Granting a carrier such an advantage and allowing it to exercise self-help would completely undermine the collective bargaining the Act is designed to encourage. In *Detroit and Toledo*, the Court said that "Because the railroad prematurely resorted to self-help, the primary goal of the Act [to prevent strikes] came very close to being defeated." 396 U.S. at 154.[32] Here, that goal was defeated. By waiting until self-help in order to make sweeping changes which it would not bring to the bargaining table, TWA has made a mockery of the Act.[33]

---

[32] The only reason it was not defeated was that the district court granted preliminary injunctive relief to the union.

[33] The briefs of TWA's *amici* are strewn with statements which are inaccurate, as well as not in the record. We do not believe that anything in those briefs requires a specific response. We note briefly however that the *amici* do not so much as discuss the

F. *There Is Nothing In The RLA Which Allows An Employer To Unilaterally Abrogate A Union Security Agreement Without Utilizing The Procedures Of The Act*

We turn now to TWA's argument that pursuant to § 2 Eleventh, the Act has a special rule in regard to union security agreements; those provisions require an "existing agreement", and therefore may be altered during self-help without regard to whether the bargaining procedures of the Act have been utilized, or so TWA claims. In many respects, this argument simply begs the question.

First, this theory is dependent upon TWA's other theory that the contract itself does not exist and that there has been a complete self-destruction of all conditions governed by the contract. For reasons set forth in detail above, this is simply not true. Accordingly, there is an agreement, and the union security provisions are still part of that agreement.

Second, in *FEC*, this Court specifically held that a "union shop provision" was a working condition within the meaning of § 2 Seventh. 384 U.S. at 245. No indication whatsoever is given that a union security provision is somehow different from other working conditions also governed by § 2 Seventh. Accordingly, § 2 Seventh prohibits a carrier during self-help from unilaterally changing a union security provision where it has failed to submit its proposed change to the bargaining processes of the Act.

Third, we know from *Manning v. American Airlines*, *supra*, that a union security provision is also a working

---

holding that the contract did not expire, discuss *FEC*, or cite § 2 Seventh of the Act. Both *amici* do state that they support TWA on all issues, seemingly with no understanding that if they are successful in helping TWA prevail in this litigation they will have reduced the clients they purport to represent to employees at will.

condition subject to the prohibitions of § 6. 329 F.2d at 35. Even TWA acknowledges that it could not change the union security agreement during the § 6 status quo period. On this point, TWA's argument breaks down; if there were a special rule to be applied to union security agreements, that rule would affect the status quo period as well as the self-help period. If this contract "expired", it must have done so on July 31, 1984, not March 6, 1986. There is no conceivable basis for arguing that a working condition embodied in an agreement subject to § 2 Seventh is not also a working condition subject to § 6. The fact that TWA does not contend that § 2 Eleventh contains a special rule exempting union security agreements from the requirements of § 6 flatly contradicts the notion that there is a special rule exempting union security clauses from the scope of § 2 Seventh.

Fourth, TWA bases most of its argument in regard to § 2 Eleventh on National Labor Relations Act (29 U.S.C. § 151, *et seq.*) case law. But if in fact there is a "dichotomy" between the NLRA and the RLA on this point, that is not necessarily surprising. As the Court said in *Jacksonville Terminal, supra*:

> It should be emphasized from the outset, however, that the National Labor Relations Act cannot be imported wholesale into the railway labor arena. Even rough analogies must be drawn circumspectly, with due regard for the many differences between the statutory schemes. (394 U.S. at 383, footnote omitted).

See also *Chicago and North Western Railway Co. v. United Transportation Union*, 402 U.S. 570, 579, n.11 (1971), where the Court said "[A]ll parallels between the NLRA and the Railway Labor Act, should be drawn with the utmost care and with full awareness of the differences between the statutory schemes". Whatever analogies may be drawn between the two statutory schemes, clearly in regard to the making of new agreements and the exercise of self-help, the two statutes are very different, as recently dramatically demonstrated by this Court's opinion in *Burlington Northern, supra*. Certainly the RLA scheme is very different not only in regard to how contracts are made but also as to *how they are altered.*

Accordingly, all of the NLRA case law cited by TWA is simply irrelevant. Under the NLRA there is no § 6, § 2 Seventh, NMB, status quo period, release, or Presidential Emergency Board. It is impossible to import the entire RLA major dispute panoply into NLRA case law and then attempt to draw intelligent analogies. We note, however, that the case law TWA relies upon developed *after* § 2 Eleventh was enacted in 1951. The only case cited by TWA which predates § 2 Eleventh is *Colonie Fibre Co. v. NLRB*, 163 F.2d 65 (2nd Cir. 1947), which does not even remotely resemble the factual situation here. In *Colonie Fibre* the union was attempting to *retroactively* enforce a new union security agreement so as to bring about the termination of employees who had not joined the union before the union security agreement was in place.

We note also that the NLRA case law may not support TWA as clearly as TWA portrays it. In *Trico Products Corp.*, 238 NLRB 1306 (1978), the duration clause of a collective bargaining agreement provided that the parties could give a notice to amend or a notice to terminate. The union gave an ambiguous notice which did not mention amendment or termination. The Board ultimately held that the notice should be construed as notice to amend, and that under the circumstances the contract continued in effect beyond its stated expiration date and, it was therefore proper to allow the union security clause to remain in effect. The notice of intended changes given here is obviously more akin to a notice to amend than a notice to terminate.

In fact, in all of the NLRA cases TWA cites the courts hold that the contracts "expire" or "terminate" and it is clear that many of those contracts have duration clauses which use those precise words. *See*, for example, *Hassett Maintenance Corp.*, 260 NLRB 1211 (1982), and *Hotel, Motel, Restaurant Employees, Local 19*, 281 NLRB No. 86 (1986). The holding here is precisely the opposite and the contract does not use those words. Where neither the statutory scheme nor the relevant facts are similar, attempts to draw exact comparisons are impossible and foolish.

Fifth, there is nothing in the legislative history of § 2 Eleventh which helps TWA. To the contrary, the debate before the House of Representatives reveals that the "[A]mendment in no way affects the present procedure of the National Mediation Board with reference to *adjustments of disputes* . . .". Report of the Committee on Labor and Public Welfare of the United States Senate on S. 3295, p. 1252 (81st Cong., Report No. 2262) (emphasis supplied). The altering of a union security provision is obviously a major dispute, and it must be dealt with in the same fashion as other major disputes.

In addition, however similar, the provisions under the RLA and NLRA are *not* identical. At the outset of § 2 Eleventh it is made clear that states cannot enact laws prohibiting RLA union security agreements contrary to the practice under the NLRA pursuant to the Taft-Hartley Act, 29 U.S.C. § 164(b). As Senator Taft himself said, § 2 Eleventh was meant to insert into the RLA the "[E]xact provisions, *so far as they fit*, of the Taft-Hartley law. . . ." [34] He went on to say that "I believe that those have worked satisfactorily under the Taft-Hartley law. I feel that they would work well *in connection with* the Railway Labor Act. In response to a question from the unions, I have stated that I thought those

[34] Although TWA quotes this very statement, the relevant language is omitted. (TWA Br. p. 21).

provisions would work well *in the railroad labor law*." (Report on S. 3295, *supra*, at 1134-1135, emphasis supplied). Obviously, the provision allowing union security agreements under the NLRA is meant to operate within and be confined by the structure of the NLRA, whereas the RLA provision is meant to work "in connection with" the RLA.

It is also quite clear from the legislative history of § 2 Eleventh that Congress was well aware that RLA contracts are of indefinite duration, that there are vast differences between the RLA and NLRA, and also vast differences between § 2 Eleventh and Taft-Hartley. Hearings on H.R. 7789 before the House Committee on Interstate and Foreign Commerce, 81st Cong., 2d Sess., at pp. 23, 133-134, 213-214; Hearings on S. 3295 before the Senate Subcommittee of the Committee on Labor and Public Welfare, 81st Cong., 2d Sess., p. 160 (1950). Congress thus had every opportunity to say that the procedure for making or altering of a union security agreement was very different from the procedure for the making or altering of an agreement governing any other working conditions, and it chose not to do so.

Sixth, there is also nothing in the language of § 2 Eleventh which requires a different result. The reference to a "termination date" in relation to an employee's ability to revoke a dues check-off provision is hardly significant. In fact, as TWA knows well, IFFA has never at any time since March 7, 1986 refused to honor any request to revoke a check-off authorization. Surely TWA does not mean to suggest that by stating that a check-off authorization could be revoked "[A]fter the expiration of one year or upon the termination date of the applicable collective bargaining agreement, whichever occurs sooner," Congress intended to restructure the entire major dispute procedure of the RLA.[35]

[35] Moreover, if there must be a "termination date", which date is it, July 31, 1984, March 7, 1986, or, as the Seventh Circuit held

Other concerns raised by TWA have already been answered in *FEC*:

> The union remains the bargaining representative of all the employees in the designated craft, whether union members or not. Steele v. Louisville & N. R. Co., 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173. All these employees of the railroad are entitled to the benefits of the collective bargaining agreement, and the carrier may not supersede the agreement by individual contracting even though particular employees are willing to enter into them. See Order of Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342, 347, 64 S.Ct. 582, 585, 88 L.Ed. 788. (384 U.S. at 246).

The working flight attendants, whether they be replacements, crossovers, or full-term strikers are, because of the orders issued in this case, currently receiving the benefits of the working conditions as they have evolved through 40 years of collective bargaining. As a result of those orders, those employees know, *inter alia*, that they are not employees at will, and that employee discipline and discharge are subject to review by a neutral arbitrator. There is nothing in the statute or in *FEC* that justifies a conclusion that a union operating under these circumstances should not have the benefit of a valid union security provision to assist it in fulfilling its duties to maintain and enforce the contractually governed working conditions.[36]

---

in *EEOC*, *supra*, is the termination date of the collective bargaining agreement the date upon which a successor agreement is reached? Further, if collective bargaining agreements with union security clauses must have termination dates, how does that affect the validity of the contracts in *FEC*, which obviously had union security but according to TWA had no termination dates?

[36] If the flight attendants wish to change collective bargaining representatives, there are statutorily mandated procedures under the control of the NMB which can accomplish that result. Unless and until a successor union is designated, however, IFFA still has a duty to represent all flight attendants. Should any member of the bargaining unit believe that IFFA has violated a duty to her there is a well recognized cause of action for breach of the duty of fair representation through which she may seek redress. That, obviously, is not at issue here.

CONCLUSION

Because neither the contract nor the RLA allow TWA to achieve through self-help that which it did not submit to the processes of the Act, the judgment below should be affirmed.

Respectfully submitted,

STEVEN A. FEHR
(Counsel of Record)
WILLIAM A. JOLLEY
DOYLE R. PRYOR
SCOTT A. RAISHER
JOLLEY, WALSH, HAGER & GORDON
204 West Linwood Blvd.
Kansas City, Missouri 64111
(816) 561-3755
Attorneys for Respondent Independent Federation of Flight Attendants

October 5, 1987

REPLY

BRIEF

Supreme Court, U.S.
FILED
DEC 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1650

IN THE

Supreme Court of the United States

OCTOBER TERM 1987

TRANS WORLD AIRLINES, INC.,

Petitioner,

vs.

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER

MURRAY GARTNER
PROSKAUER ROSE GOETZ & MENDELSOHN
300 Park Avenue
New York, New York 10022
(212) 909-7000
(Counsel of Record)

PAUL E. DONNELLY
STINSON MAG & FIZZELL
920 Main Street
Kansas City, Missouri 64105

MARK A. BUCKSTEIN
MICHAEL A. KATZ
605 Third Avenue
New York, New York 10158

Attorneys for Petitioner

Of Counsel
Carole O'Blenes
Andrew P. Marks

TABLE OF CONTENTS

	PAGE
Table Of Authorities	iii
Preliminary Statement	1
Argument	4
I. Respondent Distorts The Record And Asks The Court To Rule On Questions It Need Not Reach.	4
II. Like The Court Below, Respondent Identifies No Reasoned Basis For The Dichotomy It Would Have This Court Find In National Labor Policy With Respect To The Compulsory Payment Of Union Dues	7
III. Section 2 Seventh Does Not Deal With The Self-Help Period, Nor Does It Define Or Modify The Procedures Required By Section 6; TWA Complied With The Requirements Of Section 2 Seventh And Section 6 In All Respects	11
Conclusion	20

TABLE OF AUTHORITIES

Cases:

	PAGE
Aaxico Airlines, Inc. v. Airline Pilots Association, 331 F.2d 433 (5th Cir.), *cert. denied*, 379 U.S. 933 (1964).	5
Airline Pilots Association v. United Air Lines, 802 F.2d 886 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 1605 (1987)	11, 15
Brotherhood of Railroad Trainmen v. Akron & Barberton Belt Railroad, 385 F.2d 581 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 923 (1968)	3
Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1969)	16
Brotherhood of Railway & Steamship Clerks v. Florida East Coast Railway, 384 U.S. 238 (1966)	3, 15, 16, 17, 18
Burlington Northern Railroad v. Brotherhood of Maintenance of Way Employees, 107 S. Ct. 1841 (1987)	16, 17
Capitol-Husting Co. v. NLRB, 671 F.2d 237 (7th Cir. 1982)	11
Chicago & North Western Railway v. United Transportation Union, 402 U.S. 570 (1971)	19
Cox v. Northwestern Airlines, 319 F. Supp. 92 (D. Minn. 1970)	17
Detroit & Toledo Shore Line Railroad v. United Transportation Union, 396 U.S. 142 (1969)	13, 14
Ellis v. Brotherhood of Railway, Airline & Steamship Clerks, 466 U.S. 435 (1984)	4
Flight Engineers International Association v. Eastern Air Lines, 359 F.2d 303 (2d Cir. 1966)	1, 6

	PAGE
General Committee of Adjustment v. Missouri-Kansas-Texas Railroad, 320 U.S. 323 (1943)	8
International Association of Machinists v. Reeve Aleutian Airways, 469 F.2d 990 (9th Cir. 1972), *cert. denied*, 411 U.S. 982 (1973)	6, 12, 16, 19
International Brotherhood of Electrical Workers v. Freedom WLNE-TV, Inc., 760 F.2d 8 (1st Cir. 1985)	5
Manning v. American Airlines, 329 F.2d 32 (2d Cir.), *cert. denied*, 379 U.S. 817 (1964)	6, 12
O'Malley Lumber Co., 234 N.L.R.B. 1171 (1978)	7
Ottley v. Sheepshead Nursing Home, 688 F.2d 883 (2d Cir. 1982)	5
Virginian Ry. v. System Federation No. 40, 300 U.S. 515 (1936)	14

Statutes:

National Labor Relations Act	
Section 8(a)(3), 29 U.S.C. § 158(a)(3)	9
Railway Labor Act	
Section 2 First, 45 U.S.C. § 152, First	18
Section 2 Third, 45 U.S.C. § 152, Third	17
Section 2 Fourth, 45 U.S.C. § 152, Fourth	17
Section 2 Fifth, 45 U.S.C. § 152, Fifth	14
Section 2 Seventh, 45 U.S.C. § 152, Seventh	*passim*
Section 2 Eleventh, 45 U.S.C. § 152, Eleventh	9, 10, 12, 19
Section 6, 45 U.S.C. § 156	*passim*

PAGE

Rules:

Fed. R. Civ. P. 52(a) 5

Fed. R. Civ. P. 56(c) 5

Other Authorities:

H.R. Rep. No. 1944, 73d Cong., 2d Sess. (1934) 13

S. Rep. No. 1065, 73d Cong., 2d Sess. (1934) 13

Oversight of the National Mediation Board, Hearings Before the Subcommittee of the House Committee on Government Operations, 97th Cong., 2d Sess. (1983) 5

REPLY BRIEF FOR PETITIONER

The question presented is whether the Railway Labor Act requires the continued compulsory payment of union dues when negotiation and mediation fail to result in a successor to an agreement for a stated term.[1] The thrust of Respondent's brief is to attempt to turn this into a different case. First, IFFA would portray the issue before the Court as one of contract interpretation (Resp. Br., 13-17)[2]—a portrayal implicitly rejected by the grant of certiorari. It is obvious, moreover, that the Eighth Circuit's reading of the duration clause of the 1981-84 agreement was controlled by its erroneous construction of the Railway Labor Act as requiring "continuing agreements between management and labor." (App. Cert. 12)

Second, Respondent repeatedly asserts, with no support in the record, that TWA made unilateral changes in a whole range of working conditions not proposed for change after Section 6 notice.[3] IFFA then uses those unsupported assertions with respect to matters not even before the Court as the basis for structuring a syllogistic and flawed argument—which ignores the unique nature of union security provisions[4] and, with

---

1 As Respondent expressed it in a brief filed in an IFFA-TWA arbitration on October 13, 1987, eight days after it filed its brief in this Court, "Only the issue of the survivability of the union security clause is now before the Supreme Court." Union's Brief, President's Grievance No. 87-5006, p. 8.

2 Respondent's brief is "Resp. Br."; the brief of the AFL-CIO and the RLEA is "Amici Br."; Petitioner's main brief is "Pet. Br."; "App. Cert." refers to the Appendices to the Petition for Certiorari, and "JA" to the Joint Appendix.

3 Substitution of the non-contract employees' grievance and arbitration procedures (including neutral arbitration for discharge; *cf.* Resp. Br., 44) for the contract procedures on May 13, 1986 was based on TWA's view that the contract had expired. *See FEIA* v. *Eastern Air Lines*, 359 F.2d 303 (2d Cir. 1966). The contract procedures were restored on February 20, 1987 in response to an order by the district court in Case No. 86-6142, which also indicated that all other claims of change without prior notice, if any, should be pursued in Case No. 86-6030-SJ-6.

4 Rather than being in no way "different from other working conditions . . ." (Resp. Br., 39), such provisions, which regulate the union-

respect to other terms of employment as well, is premised on an egregious misconception of the purpose of the RLA negotiation process and a fundamental misstatement of the law:

1. Respondent postulates a negotiation process concerned not only with discussion of the parties' "intended change in agreements" (45 U.S.C. § 156) but also with how the carrier will operate if there is no agreement. Respondent's concept and that of the court below is that, under Section 6 and the negotiation process it initiates, failure to reach agreement still produces a "partial" agreement consisting of those parts of the old agreement the carrier was willing to leave unchanged only for the sake of agreement.[5]

2. Respondent asserts that Section 2 Seventh requires that each provision of an agreement be treated as perpetual and be subjected to negotiation, mediation and possible arbitration, regardless of the parties' agreement that the contract and all its provisions be for a fixed term. Section 2 Seventh does not require such treatment, but simply invokes the processes of Section 6 with respect to a major dispute about the totality of the terms of employment contained in an agreement. Section 6, in turn, does not deal with individual provisions, but with the process of replacing one agreement with another. Neither Section 2 Seventh nor Section 6 prohibits integrated agreements that stand or fall as a whole; neither purports to regulate the self-help period; and neither makes each provision of an agreement perpetual, unless the parties so agreed by making each provision specifically and separately subject to change.[6]

---

employee, not the employer-employee relationship, are *sui generis*. (*See* Pet. Br., 19, 24-25; and as to carrier's incentive to agree to them, 19, 30.)

5 Neither carries this concept of fictitious agreement so far as to say that the changes the carrier specified it wanted in a new agreement, and which it unilaterally implements when the union fails to agree, become part of the so-called "agreement."

6 The union *amici* assert that all contracts in the railroad industry were and are of indefinite duration and require separate negotiation of each provision. Nothing in the record supports that proposition and it is not true;

The absence of a compulsory dues payment requirement after the status quo period had ended cannot be described as "unilateral implemention." After the integrated agreement of which the union security provisions were a part had come to an end (as even the court below concluded it did), and the statutory procedures had been exhausted, TWA was not required to compel its employees to pay involuntary dues to a union that had freely entered into an agreement for a fixed term and then chose to engage in self-help rather than reach a successor agreement through the processes of the Act.

It does not "cut the very heart out of the RLA" (Resp. Br., 38) to permit employees freedom of choice with respect to the payment of union dues during a hiatus between integrated labor contracts. In fact, the RLA was in force for more than 15 years (1934-51) with a prohibition against any union security provision. The true anatomical metaphor is that the dues provision is an appendix, not the heart, and should be excised when the conditions for its continued existence are no longer present.

The court below paints a false picture of TWA's negotiating stance when it says that TWA hid its "true intention." (App. Cert. 18) TWA never "intended" and did not desire an "agreement" without union security provisions, and it never refused to settle the strike unless it obtained such an "agreement."

---

railroad contracts, both national and local, may be for fixed terms. *See BRT* v. *Akron & B.B. R.R.*, 385 F.2d 581, 596 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 923 (1968). Speculating that "the original patterns of agreement [may] have persisted in the railroad industry because of the needs and customs of the industry . . ." (Amici Br., 17 n.9), the *amici* cannot establish on this record what those "original patterns" were or whether they were similar in 1926 to the contracts involved forty years later in *Bhd. of Ry. & Steamship Clerks* v. *Florida East Coast Railway*, 384 U.S. 238 (1966).

The *amici* also imply that railroad contract practices were imposed on the airline industry when the RLA was made applicable to that industry. That assumption too is wrong—as fifty years of history in the airline industry testify. There has never been a national agreement in the airline industry and local agreements have taken many forms. Duration clauses differ widely, and there is no basis for saying that the negotiated differences are meaningless.

Thus, there was (and is) no "dispute" "to negotiate, mediate or arbitrate." (*Id.*) But TWA has never agreed to union security provisions without an "agreement," and there simply is nothing in the RLA that requires a carrier to seek agreement on discontinuance of the union security clause for the period when no agreement on terms and conditions of employment exists.

Neither the court below, moreover, nor Respondent ever addresses the individual rights primarily affected here. The decision below requires literally thousands of employees—on threat of discharge[7]—to pay dues to a hostile union against their will. Nothing in the RLA, or in national labor policy, permits this "significant impingement on First Amendment rights" (*Ellis* v. *BRAC*, 466 U.S. 435, 455 (1984)) in the circumstances here presented.

1. RESPONDENT DISTORTS THE RECORD AND ASKS THE COURT TO RULE ON QUESTIONS IT NEED NOT REACH.

1. This case involves no alleged "change" in conditions of employment other than TWA's refusal to continue the requirement for dues payment and check-off after the status quo period had ended. The issue is not whether "once the self-help period begins, the carrier may change any and all working conditions at will, without regard to what changes have been the subject of negotiations." (Resp. Br., 10-11)

2. The result below does *not* "flow[ ] directly from the language of the duration clause in the agreement." (Resp. Br., 7) The court below imposed union security provisions on TWA (and its employees) not as a matter of contract, but by operation of the Act as the Eighth Circuit viewed it. (*See* Pet. Br., 36-37.) There is no disagreement that " 'words [in a contract must be] read in their context *and in light of the law*

7 Respondent's motion to hold TWA in contempt for failure to discharge some 150 working flight attendants who allegedly have failed to pay dues to IFFA is pending in the district court in Case No. 86-6030-CV-SJ-6.

under which the contract was made.' " (Amici Br., 23-24; emphasis in original) The court below, however, did neither.[8]

It is not true, moreover, that the court below relied on evidence regarding the "bargaining history" of the duration clause or evidence regarding the "intent" of the parties. (Resp. Br., 13-14) No such evidence was before the court.[9] Indeed, the only evidence of the context within which the parties included Article 28 in their first (1978) agreement is that, by that time, both the Second and Ninth Circuits had interpreted contracts

8 *See* Pet. Br., 4 n.4, 10 n.8, 27 n.19, 22 n.13. The district court's "interpretation" of the duration clause is not a "finding of fact" subject to the Fed. R. Civ. P. 52(a) "clearly erroneous" standard on review. (Resp. Br., 13-14) The district court made no findings as to disputed facts and, on the parties' cross-motions for summary judgment, was not authorized to do so. Fed. R. Civ. P. 56(c). If the duration clause were as ambiguous as the courts below made it seem (App. Cert. 14, 40), its interpretation would be a "minor dispute" within the exclusive jurisdiction of a board of adjustment. *See, e.g., Aaxico Airlines, Inc.* v. *ALPA*, 331 F.2d 433, 436-37 (5th Cir.), *cert. denied*, 379 U.S. 933 (1964); *see also IBEW* v. *Freedom WLNE-TV, Inc.*, 760 F.2d 8 (1st Cir. 1985); *Ottley* v. *Sheepshead Nursing Home*, 688 F.2d 883, 887 (2d Cir. 1982).

Even if the district court, *arguendo*, had jurisdiction to interpret an ambiguous duration clause (Resp. Br., 17 n.12), and its conclusion with respect to "partial renewal" were correct, nevertheless the ultimate question of the meaning of Article 24 (*i.e.*, whether that provision was intended to cover permanent replacements or crossovers during and after a strike) clearly would be within the exclusive jurisdiction of a board of adjustment.

9 What Respondent mislabels "bargaining history" was the parties' subsequent oral reference to the "amendable" date of the agreement. (App. Cert. 9; JA 29) Plainly, the 1981-84 agreement was "amendable" after July 31, 1984, since its effective term had expired. As Article 24 makes plain, the agreement had a "termination date" (App. Cert. 73), a "term" (App. Cert. 67), and a limited "life" (App. Cert. 72). *See also Oversight of the National Mediation Board, Hearings Before the Subcomm. of the House Comm. on Government Operations*, 97th Cong., 2d Sess., 22, 37 (1983) (statement of Arthur Teolis, president, Independent Federation of Flight Attendants, referring to the "expiration date" of the 1978-81 TWA-IFFA agreement and the "term" of a successor agreement).

containing that particular language as "com[ing] to an end" or "terminat[ing]"[10] upon service of a Section 6 notice.

The Eighth Circuit also referred to the "words of TWA's reopener notice" and purported to find them significant because they did not "suggest that failure to reach accord would terminate the balance of . . . the agreement." (App. Cert. 8-9) The court signally failed to observe, however, that TWA's proposals (mislabeled a "reopener") specifically contemplated "the execution of a basic collective bargaining agreement, succeeding the current agreement" (JA 38), not the "mutilated collective bargaining agreement" (App. Cert. 39 n.8) the courts below created. Under the duration clause, moreover, all that was required to prevent renewal of the "entire Agreement" was "notice of intended change" (App. Cert. 78)—*not* of termination, and such notice was given by both parties. (*See* Pet. Br., 34 n.23.)

3. According to Respondent, if TWA prevails, it would "create a drastic imbalance" between carrier and union, and would "truly cut the very heart out of the RLA." (Resp. Br., 38) The *amici* argue that the effect "would be to create a strong incentive for carriers *not* to reach agreement . . ."[11] and that

10 *IAM* v. *Reeve Aleutian Airways*, 469 F.2d 990, 991 (9th Cir. 1972), *cert. denied*, 411 U.S. 982 (1973); *FEIA* v. *Eastern Air Lines*, 359 F.2d 303, 309 (2d Cir. 1966). *See also Manning* v. *American Airlines*, 329 F.2d 32, 34 (2d Cir.), *cert. denied*, 379 U.S. 817 (1964).

11 Even stated as Respondent's broad argument, as it is, about provisions other than compulsory dues payment, this assertion makes no sense. If a carrier wished to *fail* to reach agreement, so that it could be free of restraint in the self-help period, it could achieve that result more readily by proposing to change every provision in the existing agreement rather than by limiting its proposed changes to only a few.

Respondent also argues that a carrier should not be allowed "to achieve through self-help that which it did not submit to the processes of the Act" (Resp. Br., 7). That argument exposes Respondent's underlying assumption that the union will lose the strike because it does not have the economic power to achieve what it sought when it called the strike. The major incentive intended to act upon either party once the stage of self-help or "economic warfare," as some courts have described it, has begun, is economic power. Respondent's interpretation of the Railway Labor Act would assure that

"there is a fundamental incompatibility between an obligation to engage in good faith bargaining with a union and the act of unilaterally imposing upon bargaining unit employees a wage or term of employment not first presented to the exclusive representative for consideration at the bargaining table." (Amici Br., 8, 9; emphasis in original)[12] For obvious reasons, however, both IFFA and the *amici* carefully refrain from addressing whether any of these contentions even arguably apply to the only so-called unilateral change here in issue. (*See* p. 4, *supra*, and Pet. Br., 23-25.)

II. LIKE THE COURT BELOW, RESPONDENT IDENTIFIES NO REASONED BASIS FOR THE DICHOTOMY IT WOULD HAVE THIS COURT FIND IN NATIONAL LABOR POLICY WITH RESPECT TO THE COMPULSORY PAYMENT OF UNION DUES.

1. The question whether dues payment and check-off requirements continue in effect is *not* "dependent upon" a

even if a union grievously overestimates its economic power and insists upon striking to achieve over-ambitious objectives, the courts will greatly enhance that economic power by restricting the employer in the free exercise of its economic power, imposing on it the limiting terms of an expired agreement which the union could have had in the new agreement it refused to make.

It is absurd to say that the carrier "achieves" anything by whatever terms it establishes in exercising its right to operate when a union strikes. If the union has the superior economic strength, that "achievement" will be very short-lived. Indeed, the NLRB has held that a party may increase its demands if it demonstrates dominant economic strength during a strike. *See, e.g., O'Malley Lumber Co.*, 234 N.L.R.B. 1171, 1179-80 (1978); *cf.* Resp. Br., 38 (claiming that a union is "limited" to its bargaining proposals). On the other hand, if the union does not have the economic strength to bend the carrier to its will, for the courts to insist that the carrier continue to suffer restrictions it was willing to have along with labor peace, while it does not have peace, is to allow the union to have its cake and eat it too.

12 Ironically, the *amici* rely on cases decided under the NLRA in stating the latter proposition, but without making any reference to the fact that union security provisions have long been recognized as a statutorily mandated exception to the NLRA rule. (Pet. Br., 24-25) Nor do the *amici* explain how the expiration of the compulsory requirement to pay dues amounts to "unilaterally impos[ing]" a "term of employment."

theory "that there has been a complete self-destruction of all conditions governed by the contract." (Resp. Br., 39) What other conditions continue after the RLA procedures have been exhausted without yielding a successor to an agreement for a fixed term is a question that need not be answered in this case. Clearly, as to conditions other than the compulsory payment of union dues, it is one that the statute does not expressly address.

The Act leaves any further government intervention in a major dispute, after the Section 5 First cooling-off period, to the Executive branch and to Congress. (*See* Pet. Br., 43-47; *General Committee* v. *M.-K.-T. R.R.*, 320 U.S. 323, 337 (1943).) But even if the RLA did require that working conditions, not specifically proposed for change after a Section 6 notice, continue—subject to further unspecified bargaining—after the statutory procedures have been exhausted, there is no warrant in the Act for a "special rule," contrary to Section 2 Eleventh, which requires union security provisions to be continued when they can no longer be said to partake of the consent they enjoyed when, and because, they were part of an integrated labor agreement.

2. The 1981-84 agreement was in force for a " 'stated term' " (Resp. Br., 10), *i.e.*, from August 1, 1981 to July 31, 1984. Even the court below concluded that, under Article 28, service of a Section 6 notice prevented renewal of *that* agreement. Whatever "mutilated collective bargaining agreement" (App. Cert. 39 n.8) was "partially renewed" after July 31, 1984, it clearly was not the agreement of which TWA had consented the union security provisions would be a part.

3. Respondent contends, for the purpose of its syllogism, that union security provisions are a "working condition" (Resp. Br., 39-40)—like any other—which it says must be subjected to individualized bargaining. It does not address their unique nature or the special treatment accorded them by Congress and the courts. IFFA argues that TWA's "acknowledge[ment] that it could not change the union security agreement during the § 6 status quo period," "flatly contradicts the notion that there is a special rule exempting union security clauses from the scope of § 2 Seventh." (Resp. Br., 40) TWA

has not argued for any such special rule. The union security clauses remained in effect during the status quo period because Section 6 mandates that *all* conditions at the time Section 6 notice is served remain unchanged; they did not continue in the self-help period, not because they were exempted from Section 2 Seventh (which does not apply (*see* pp. 11, 13-16, *infra*)) but because they did not then comply with Section 2 Eleventh.

IFFA completely disregards that, during the Section 6 status quo period, while the carrier is required to maintain *all* working conditions in effect, the union is prohibited from engaging in self-help. Despite their emphasis on "balance" and "equity" (Resp. Br., 20-25, 38; Amici Br., 22), neither Respondent nor the *amici* explain why "balance" and "equity" require a carrier to enforce union security provisions when the union *is* free to strike and engage in other self-help.

4. Conclusory assertions aside (Resp. Br., 41-43), Respondent identifies no "difference" between the RLA and the NLRA that would support the dichotomy in national labor policy for which it argues. It points to no lack of identity in the statutory language that bears on the question presented. And it specifies nothing in the legislative history of Section 2 Eleventh even suggesting that Congress intended that provision—unlike the essentially identical proviso to Section 8(a)(3) of the NLRA—to give indefinite life to union security provisions.[13]

Underlying Respondent's contentions in the few pages of its brief even superficially addressed to union security provisions is an apparent inability to appreciate the significance of what Respondent refers to as a " 'metaphysical distinction' ":

---

13 The "vast differences between § 2 Eleventh and Taft-Hartley" referred to at the pages cited by Respondent (Resp. Br., 43) are: (i) the NLRA requirement of an authorization election (which was already in the process of being repealed at the time of the hearings on Section 2 Eleventh and was, in fact, repealed in 1951); (ii) the language of the NLRA Section 8(a)(3)(A) and (B) proviso (which was added to Section 2 Eleventh before it was enacted); (iii) Section 2 Eleventh's preemption of state "right-to-work" laws; and (iv) RLA coverage of "subordinate officials." Thus, two of the "vast differences" are, in fact, nonexistent; and Respondent does not even purport to explain what bearing the other two have on this case.

whether a working condition remains in effect by agreement or by force of the statute. By labeling that distinction as merely "semantics" (Resp. Br., 34), IFFA apparently seeks to obscure the fundamental incompatibility between the result reached below and the Congressional intent, in the context of "free-rider" concerns (Pet. Br., 20 n.11), to provide that compulsory dues payment obligations should be valid only because of the mutual consent of carrier and union (Pet. Br., 20-26), and not because they were "extremely important" to the union (Pet. Br., 28).[14]

5. Respondent has not disputed that the decision below is an inversion of legislative intent in that it effectively permits the strikers to be "free-riders." (Pet. Br., 20 n.11, 28 n.20) Thus, the double anomaly of the Union's position here is that it wants the carrier and employees to be forced to continue to furnish financial support to the Union when the carrier does not have labor peace and the employees do not have the benefit of an agreement negotiated by the Union.[15] The more than $2,500,000 in dues paid by the working flight attendants since April, 1986 has not been used by IFFA "to maintain and enforce the contractually governed working conditions" (Resp. Br., 44; footnote omitted), but to finance the litigation to

14 Contrary to the speculation of the union *amici* (Amici Br., 20), there is no evidence that Section 2 Eleventh was intended to prevent carrier domination of unions or to forbid unilateral imposition by a carrier of union membership requirements—an event that the *amici* concede is unlikely "ever" to arise (Amici Br., 20 n.11); clearly, a carrier could "agree" with a carrier-dominated union.

15 The working flight attendants are not "currently receiving the benefits of the working conditions as they have evolved through 40 years of collective bargaining." (Resp. Br., 44) IFFA had been the flight attendants' bargaining representative for only [illegible] years when the 1981-84 contract was signed in 1983; and when IFFA refused, after nearly two years of bargaining, to agree to the substantial changes in wages and work rules proposed by TWA, TWA implemented those changes unilaterally as it had a right to do.

compel the working flight attendants to pay dues and to displace them from their jobs. (Pet. Br., 2-3 n.2, 14 n.10).[16]

III. SECTION 2 SEVENTH DOES NOT DEAL WITH THE SELF-HELP PERIOD, NOR DOES IT DEFINE OR MODIFY THE PROCEDURES REQUIRED BY SECTION 6; TWA COMPLIED WITH THE REQUIREMENTS OF SECTION 2 SEVENTH AND SECTION 6 IN ALL RESPECTS.

Respondent says that "this case centers upon Section 2 Seventh of the Act . . ." and that Section 2 Seventh "obviously encompasses what unilateral changes a carrier may make during self-help." (Resp. Br., 17, 18) Even if it were necessary to reach that point, the very words of Section 2 Seventh, its legislative history, this Court's decisions, and Respondent's own concessions all establish that Respondent's view of the function of that statutory provision is entirely wrong.

1. Section 2 Seventh simply provides that no carrier shall change the terms of employment "as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title." It clearly deals with what a carrier may not do while there is an agreement in force. It says nothing about what the carrier may do in the self-help period after the parties have been unable to reach a new agreement; nor does it impose an impasse procedure during that period similar to that which the courts have read the NLRA to require after contract expiration.[17] Equally plain is that the Section 2

16 It is particularly inequitable to force strike replacements to pay dues to the union whose primary objective is to have full-term strikers displace them. *Cf. Capitol-Husting Co. v. NLRB*, 671 F.2d 237, 246 (7th Cir. 1982); *ALPA v. United Air Lines*, 802 F.2d 886, 908 (7th Cir.), *cert. denied*, 107 S. Ct. 1605 (1987).

17 As both Respondent and the union *amici* concede (Resp. Br., 10; Amici Br., 6-7 n.1), the NLRA and the RLA have radically different methods of assuring that the bargaining rights of the union are respected. The "almost interminable" process prescribed, after contract expiration, by the RLA (and

Seventh prohibition does not apply if a carrier acts in accordance with the terms of an agreement or follows the process mandated by Section 6.

The authorization in Section 2 Seventh to change conditions "in the manner prescribed in [the] agreements" that embody them is not limited to making those changes "required, or mandated, or dictated." (Resp. Br., 23) Thus, Article 28 "prescribed," *i.e.*, stated or specified, that the entire agreement, including the dues provisions, would not renew itself if a Section 6 notice of intended change in the agreement was served. For the purposes of this case, that is the central fact. Section 6 notices were served by both parties, and thus the agreement was not renewed. *A fortiori*, the union security provisions were not authorized by Section 2 Eleventh after the end of the status quo period, regardless of whether the conditions established by the other terms of the agreement could be altered without further negotiation in accordance with some unspecified process.

TWA agreed to be bound by the compulsory dues requirements only during the period of labor peace represented by a complete labor agreement and extended by the status quo provisions of the Act. An agreement that expires at a time when a Section 6 notice preserves conditions through the status quo does not continue after the status quo period. That principle was recognized by the Second Circuit in *Manning* v. *American Airlines*, 329 F.2d 32, 34 (2d Cir.), *cert. denied*, 379 U.S. 817 (1964), when it held that the effect of Section 6 was to extend only for a "limited period," *i.e.*, until the end of the status quo period, a dues checkoff obligation that had "expired," and by the Ninth Circuit in *IAM* v. *Reeve Aleutian Airways*, 469 F.2d 990 (9th Cir. 1972), *cert. denied*, 411 U.S. 982 (1973).

---

ent the NLRA) during which a total status quo must be maintained until a governmental agency (NMB) determines that "the parties have satisfied their bargaining obligations" (*Id.*) precludes judicial imposition of an additional partial status quo period.

2. Respondent accepts that under the RLA, as "originally passed," a carrier was not "limited in its exercise of self-help by the scope of its bargaining proposals." (Resp. Br., 20) *Ergo*, argues IFFA, when Section 2 Seventh was "added" in 1934, it must have been to "balance" the rights of the parties during self-help.

No support for this "clear" and "obvious" (Resp. Br., 20, 24) theory is cited. (Resp. Br., 20-25). Nor is to be found, notwithstanding that had Congress intended such a drastic change in the scope of permissible self-help, "it certainly could have said so in plain English." (Resp. Br., 23 n.16) To the contrary, the legislative history of the 1934 amendments makes plain that no such basic change was intended:

> "*The bill does not introduce any new principles into the existing Railway Labor Act*, but it is designed to amend that act in order to correct the defects which have become evident as a result of 8 years of experience. It does not change the methods of conference, mediation, and voluntary arbitration to settle major disputes over wages and working conditions, which are provided in the Railway Labor Act of 1926 now in effect."[18]

There is not the slightest suggestion in Section 2 Seventh or in its history that Congress fundamentally changed the Act, so that, after 1934, it dealt with the self-help period whereas,

---

18 H.R. Rep. No. 1944, 73d Cong., 2d Sess. (1934); emphasis added. The principal "defects" referred to were (i) the failure of some carriers to establish boards of adjustment and (ii) the maintenance by some carriers of company-dominated unions. *Id.*; *see also* S. Rep. No. 1065, 73d Cong., 2d Sess. (1934). In addition, the final 30-day cooling off period was added to Section 5 First, as Commissioner Eastman testified, to "plug [the] hole" that allowed carriers to "change the rates of pay, rules, or working conditions arbitrarily, . . ." prior to the appointment of an Emergency Board under Section 10. Hearings on S. 3266 before the Senate Committee on Interstate Commerce, 73d Cong., 2d Sess., 21 (1934), reproduced in *Detroit & T. Shore Line R.R.* v. *UTU*, 396 U.S. 142, 152 n.19 (1969). There is, however, not even a suggestion in the legislative history that Section 2 Seventh was "designed to plug a hole in the Act" (Resp. Br., 24 n.18), nor that, after the newly added 30-day cooling off period was over, changes could not be made "arbitrarily."

before that, it confined its scope to the agreement, negotiation, mediation and status quo periods. The "8 years of experience" since 1926 would have revealed little about the carriers' actions during self-help because "[i]n the eight years subsequent to the passage of the 1926 Act, there were only two small railroad strikes." *Virginian Ry.* v. *System Federation No. 40*, 300 U.S. 515, 553 n.7 (1936). "Statutes must be construed in relation to the evils which they were designed to cure." *Id.* at 525. The 1934 amendments obviously were not designed to cure a non-existent evil.

3. Section 2 Seventh was not "added" to the Act in 1934 in the sense that Respondent suggests. The 1926 Act provided in Section 2 Fifth:

> "Disputes concerning changes in rates of pay, rules, or working conditions shall be dealt with as provided in section 6 and in other provisions of this Act relating thereto."

The rewording and renumbering of Section 2 Fifth into Section 2 Seventh (and continuing its function of calling Section 6 into play) did not substantively change the rights of those carriers that proceeded as provided by Section 6 without reaching an agreement. If anything, the rewording made the provision less restrictive because it (i) allowed changes to be made as provided in Section 6 *or* "in the manner prescribed in such agreements," and (ii) made clear that it was concerned only with major disputes, *i.e.*, "changes in rates of pay, rules, or working conditions" (1926 Act), of "employees as a class, *as embodied in agreements*" (1934 Act).

4. In the face of the clarity with which this Court has described the function and limitations of Section 2 Seventh, Respondent tenders an entirely opposite and inconsistent reading. This Court said plainly and unequivocally, in *Detroit & T. Shore Line R.R.* v. *UTU*, 396 U.S. 142, 156 (1969), that "Section 2, Seventh . . . does not impose any status quo duties attendant upon major dispute procedures." The Court also said that Section 2 Seventh has two purposes: (1) "to give legal and binding effect to collective agreements . . ."; and (2) to

require "that collective agreements can be changed only by the statutory procedures." (*Id.*)[19] Thus, the statutory obligation imposed by Section 2 Seventh is to maintain the agreement in accordance with its terms, and to observe Section 6 when invoked, not to maintain the status quo after a Section 6 notice has been served and negotiations have ended unsuccessfully.

5. It is mere wishful thinking for Respondent to say that Article 28 of the TWA-IFFA agreement is "not so different" (Resp. Br., 15) from the duration clauses before the Court in *Bhd. of Ry. & Steamship Clerks* v. *Florida East Coast Railway* ("*FEC*"), 384 U.S. 238 (1966). Nothing in this Court's opinion in *FEC* supports that claim.[20] The most significant fact of *FEC* was that the carrier conceded that the provisions it wanted to "suspend" were in force. Brief for FEC in No. 783 (Oct. Term 1965), 27-32. (*See also* Pet. Br., 31-32.) Thus, *FEC* "center[ed] around § 2 Seventh" (384 U.S. at 243) only because it involved the enforcement of "existing" agreements (*Id.* at 241, 242, 243).

That distinction has been recognized by the Seventh and the Ninth Circuits in rejecting arguments similar to those made by Respondent here. *See ALPA* v. *United Air Lines*, 802 F.2d 886, 898-99, 910 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 1605

---

19 Despite this Court's clear statement with respect to the first stated purpose, Respondent says that to assert that Section 2 Seventh made collective bargaining agreements enforceable is "nonsensical." (Resp. Br., 22 n.15) As to the second purpose, which the Court described as requiring that collective *agreements* can be changed only by the statutory procedures, Respondent asserts that Section 2 Seventh, in conjunction with Section 6, requires that each provision in a collective agreement can be changed only by the statutory procedures. But this Court said nothing about individual processing of specific changes, because Section 6 contains no such provision either making the terms of an agreement perpetual until changed or requiring that each particular term be processed through a release to self-help.

20 *See also* Pet. Br., 31-32 n.22. The indefinite duration of the agreements before the Court in *FEC* is confirmed by the very duration clause relied on by Respondent, which provided that the agreement between FEC and the Brotherhood of Railway and Steamship Clerks "shall continue in effect until changed as provided herein or in accordance with the Railway Labor Act . . . ." (JA 26)

(1987); *IAM* v. *Reeve Aleutian Airways*, *supra*. And it is confirmed by this Court's decisions following *FEC*. Neither *Shore Line* (in its discussion of Section 2 Seventh), *BRT* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 392 (1969) (in holding that "parties who have unsuccessfully exhausted the Railway Labor Act's procedures for resolution of a major dispute [are free] to employ the full range of whatever peaceful economic power they can muster, so long as its use conflicts with no other obligation imposed by federal law"),[21] nor *Burlington Northern R.R.* v. *Bhd. of Maintenance of Way Employees*, 107 S. Ct. 1841, 1854 (1987) (in recognizing the availability of self-help as a motive power for agreement)[22] even refer to *FEC* as recognizing a statutory restriction on the carrier's right of self-help.

6. The fundamental assumption of the union *amici* is that "Congress in the RLA has prescribed a uniform mechanism for altering working conditions once those conditions are agreed upon by a carrier and union." (Amici Br., 3; emphasis omitted) The union in *Reeve Aleutian* made the same argument, saying "any proposed change in status quo, whether or not embodied in an agreement, must undergo the statutory procedure of notice, negotiation and mediation." 469 F.2d at 993. The Ninth Circuit succinctly and correctly responded "But this is not what the Act says." (*Id.*) Section 6 does not deal with individual changes in rates of pay, rules and working conditions in effect during the status quo period but rather

21 Plainly, the *Jacksonville Terminal* Court did not view the RLA as a federal law imposing obligations during the self-help period. Indeed, it refused to restrict the union's resort to self-help precisely because it is for Congress, and not the courts, to strike the balance " 'between the *uncontrolled* power of management and labor to further their respective interests' " and "[t]he Congress has not yet done so." 394 U.S. at 392 (citation omitted; emphasis added).

22 When the *Burlington* Court wrote that the result in *FEC* was reached " 'with reference simply to the RLA itself' " (Resp. Br., 30), it meant only that, in *FEC*, the Court "was not confronted with a question whether § 4 of the Norris-La Guardia Act would prohibit the injunction" approving deviations from the terms of the collective agreements before the Court. 107 S. Ct. 1841, 1853 n.14.

with "change in agreements," as the Ninth Circuit emphasized—in other words, the substitution of one agreement for another.[23]

Under Section 6, "until" the processes of the Act have been exhausted without agreement, "rates of pay, rules, or working conditions," without exception, "shall not be altered by the carrier." The reasonable inference from that language is that when the parties are released from the compulsion not to change *any* condition, they are then free to change *any* condition, subject to the requirements of Section 2 Third and Fourth.[24] As this Court said in *Burlington Northern*, the RLA requires all parties "to abide by the terms of the most recent collective-bargaining agreement *until* all the settlement procedures provided by the RLA have been exhausted . . . ." 107 S. Ct. at 1851 (citations omitted; emphasis added) Section 6 simply does not say that before any condition may be changed, that change must be proposed and processed through the steps of the RLA. If it did, then it would be superfluous to provide that no working condition could be changed during the status quo period.

23 Each disagreement over each term of a proposed new agreement does not constitute a "major dispute." Fifteen proposed changes in an agreement do not give rise to fifteen "major disputes". Only in the case of indefinite contracts consisting of separate and independent "rules" (like those before the Court in *FEC*) does the structure of the parties' agreement lead to a series of "major disputes" involving proposed changes in different rules of the contract and, therefore, successive (and perhaps overlapping) status quo periods with respect to successive Section 6 notices.

24 It is nonsense to suggest, as Respondent does (Resp. Br., 32 n.24), that RLA Section 2 Fourth "provides an equally applicable basis for affirming the result below." *Cox* v. *Northwest Airlines*, 319 F. Supp. 92 (D. Minn. 1970), notwithstanding, Section 2 Fourth—which, standing alone, prohibits compulsory dues payment and check-off—simply cannot be read as forbidding the discontinuance of such provisions. In virtually every respect, the *Cox* decision reflects a fundamental misunderstanding of the design of the RLA—as evidenced by the court's suggestion that, once the statutory procedures have been exhausted, a carrier may not implement even those changes that it has specifically proposed. 319 F. Supp. at 99.

7. There is no disagreement that the "entire design of the RLA is to confine and refine a major dispute to its narrowest dimensions." (Resp. Br., 38) The most effective way for both parties to attempt to reach agreement is to limit their proposals to those provisions of the old agreement that they wish to change and to communicate (by silence) their willingness to accept other provisions unchanged—if a new agreement is reached. When that effort fails, resulting in no agreement, that is not a failure of either carrier or union to "submit to the processes of the Act" (Resp. Br., 20) the provisions the parties were willing to accept in a new agreement. Those provisions were "submit[ted] to the processes of the Act" during the parties' effort to substitute a new agreement for the old one.

The rule urged by Respondent will have the effect of forcing carriers to expand the scope of their proposals, in anticipation of a failure to reach agreement. Otherwise, if there is a strike, the union will most certainly then have no incentive to agree to changes that would allow the carrier to operate with strike replacements. In anticipation of the futility of seeking union agreement on additional changes during a strike, therefore, the dispute will be expanded, and the parties' efforts (as well as those of the NMB) will be diverted from the matters truly at issue.

Thus, IFFA's reading of Section 2 Seventh (Resp. Br., 17-25) would not preclude the result it views with such alarm—even if the agreement noticed for change were of *indefinite* duration. It would merely require the carrier to propose after its Section 6 notice that, if the statutory procedures are exhausted without reaching a new agreement, the carrier will not be bound by any provision of the old agreement.[25]

---

25 The *amici*'s reliance on this supposed practice in the railroad industry apparently after the *FEC* decision, citing a privately published book authored by a single practitioner not subject to cross-examination, merely highlights the inappropriateness of announcing a broad rule with respect to the permissible scope of self-help in the context of cross-motions for summary judgment on a record limited to union security provisions. The *amici*, moreover, do not disclose whether railroad parties "exert every reasonable effort" (RLA, Section 2 First) to agree on a proposal to make every contract provision ineffective in the event of a strike.

Respondent apparently fails to recognize, moreover, that an agreement for a fixed term serves the same purpose and has the same effect as would the proposal described above. It puts the carrier, the union, and the National Mediation Board on notice of the consequences of a failure to reach agreement through the statutory procedures: no agreement in effect. The difference is that in the case of a fixed term agreement, that consequence is the result of agreement by the parties—not unilateral action by the carrier when the status quo period ends.

8. Asserting that the cases cited by TWA (other than *IAM* v. *Reeve Aleutian*) do "not deal with what a carrier [may] do during self-help" (Resp. Br., 33, 34), Respondent chooses not to address their relevance. They demonstrate that the basic premises of the Eighth Circuit are wrong: (i) RLA agreements do "expire" or "terminate" (*see* Pet. Br., 33-38); and (ii) the RLA does not require "continuing agreements." *A fortiori*, it imposes no such requirement with respect to union security clauses, for the independent reason that their validity is governed by RLA Section 2 Eleventh.

In the final analysis, Respondent's effort to recast Section 2 Seventh as a status quo provision and, in effect, to bootstrap a fixed term agreement into perpetuity must be rejected if the "strong federal labor policy against governmental interference with the substantive terms of collective-bargaining agreements" and its support for true agreements, freely made, is to be preserved. *Chicago & N.W. Ry.* v. *UTU*, 402 U.S. 570, 579 n.11 (1971).

CONCLUSION

If the issue is as Respondent now states it, "does the Act require that the employer bargain over that which it intends to change," the direct answer is that TWA did so. No agreement was reached. Yet Respondent urges that TWA is nevertheless bound to continue to require employees to pay dues to the union. The true question is: what in the RLA requires that the flight attendants who exercised their freedom of choice to work during and after the strike, under conditions lawfully imposed by TWA, not those sought by the Union, must nevertheless pay dues to the Union to support its continuing fight with TWA—the principal objective of which is to displace the dues-paying employees with strikers? The RLA imposes no such requirement. The judgment below should, therefore, be reversed.

Respectfully submitted,

MURRAY GARTNER
PAUL E. DONNELLY
CAROLE O'BLENES
MARK A. BUCKSTEIN
ANDREW P. MARKS
MICHAEL A. KATZ
Of Counsel
Attorneys for Petitioner

December 21, 1987

AMICUS CURIAE

BRIEF

MOTION FILED
AUG 13 1987

(6)

No. 86-1650

In the Supreme Court of the United States

OCTOBER TERM, 1987

TRANS WORLD AIRLINES, INC.,
Petitioner,

vs.

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF AMICUS CURIAE, CROSSOVER FLIGHT ATTENDANTS IN SUPPORT OF PETITIONER

MARK P. JOHNSON
Counsel of Record
DAVID L. WING
L. CAMILLE HEBERT
of SPENCER, FANE, BRITT & BROWNE
1400 Commerce Bank Building
1000 Walnut Street
Kansas City, Missouri 64106-2140
(816) 474-8100
Attorneys for Amicus Curiae, Crossover Flight Attendants

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

36 pp

TABLE OF CONTENTS

Table of Authorities II

Motion for Leave to File Brief 1

Brief of Amicus Curiae 5

Interest of Amicus Curiae 5

Argument 6

I. The Language and Legislative History of Section 2, Eleventh of the Railway Labor Act Mandate That Union Security and Dues Checkoff Clauses Are Not Enforceable After the Stated Term of the Contract and Initiation of Economic Strike Activity 6

II. Policy Considerations Counsel Against the Continuation of the Union Security and Dues Checkoff Clauses 12

Summary of Argument 15

Conclusion 16

Appendix A A1

List of Crossover Flight Attendants Filing This Motion and Brief A1

TABLE OF AUTHORITIES

Cases

American Thoro-Clean, Ltd., 283 NLRB No. 170 (1987) 10
Bethlehem Steel Co., 136 NLRB 1500 (1962), *enf'd in relevant part*, 320 F.2d 615 (3d Cir. 1963), *cert. denied*, 375 U.S. 984 (1964) 10, 11
Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1969) 6
Brotherhood of Railway & Steamship Clerks v. Florida East Coast Railway, 384 U.S. 238 (1966) 15
Hassett Maintenance Corp., 260 NLRB 1211 (1982) 10
Hudson Chemical Co., 258 NLRB 152 (1981) 11
Industrial Union of Marine and Shipbuilding Workers of America v. N.L.R.B., 320 F.2d 615 (3d Cir. 1963), *enf'g in relevant part*, 136 NLRB 1500 (1962), *cert. denied*, 375 U.S. 984 (1964) 11
N.L.R.B. v. International Union, United Automobile, Aircraft, and Agricultural Implement Workers of America, 297 F.2d 272 (1st Cir. 1961) 11
N.L.R.B. v. International Union, United Automobile, Aircraft, and Agricultural Implement Workers of America, 194 F.2d 698 (7th Cir. 1952) 11
N.L.R.B. v. Truck Drivers Local Union No. 449, 353 U.S. 89 (1957) (*Buffalo Linen*) 10
Northcross v. Board of Education of the Memphis City Schools, 412 U.S. 427 (1973) 10
Pattern Makers' League v. N.L.R.B., ... U.S. ....., 105 S.Ct. 3064 (1985) 12
Peerless Roofing Co., Ltd., 247 NLRB 500 (1980), *enf'd*, 641 F.2d 734 (9th Cir. 1981) 10
Redway Carriers, Inc., 274 NLRB 1359 ('985) 10

Robbins Door & Sash Co., Inc., 260 NLRB 659 (1982) 10-11
Robinson v. Pan American World Airways, 777 F.2d 84 (2d Cir. 1985) 6
Trico Products Corp., 238 NLRB 1306 (1978) 10
Watson-Rummell Electric Co., 277 NLRB No. 162 (1985) 10

Statutes

National Labor Relations Act, Section 8(a)(3), 29 U.S.C. §158(a)(3) ..... *Passim*
National Labor Relations Act, Section 302(c)(4), 29 U.S.C. §186(c)(4) ..... *Passim*
Railway Labor Act, Section 2, Eleventh, 45 U.S.C. §152, Eleventh ..... *Passim*

Legislative History

S. Rep. No. 2262, 81st Cong. 2d Sess., *reprinted in* 1950 U.S. Code Cong. & Ad. News 4319 9
H. R. Rep. No. 510, 80th Cong. 1st Sess., *reprinted in* 1947 U.S. Code Cong. & Ad. News 1135 9

No. 86-1650

In the Supreme Court of the United States

OCTOBER TERM, 1987

TRANS WORLD AIRLINES, INC.,
Petitioner,

vs.

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION OF CROSSOVER FLIGHT ATTENDANTS FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER

A group of Trans World Airlines ("TWA") flight attendants who chose not to participate in the 1986 strike by the Independent Federation of Flight Attendants ("IFFA") against TWA or who returned to work during the pendency of the strike, collectively referred to as the Crossover Flight Attendants, respectfully move the Court for leave to file a brief amicus curiae supporting the position of the petitioner, TWA. The group is comprised of approximately 500 of a total of some 1280 flight attendants who returned to work during the strike. Attached as Appendix A to the Brief is a listing of the Crossover Flight Attendants on whose behalf this Motion and the Amicus Curiae Brief are filed.

The issue in this case is whether the union security and the dues checkoff clauses of the TWA-IFFA collective bargaining agreement continue in force beyond the agreement's stated expiration date and the ensuing status quo period. The decision of the United States Court of Appeals for the Eighth Circuit, reported at 809 F.2d 483, has held under the Railway Labor Act that such contract clauses remain binding.

The Crossover Flight Attendants are presently working for TWA. Under the decision of the Eighth Circuit, they are compelled to pay dues to IFFA, even though many of them have resigned from IFFA and the Union is using those dues in related litigation to throw the Crossover Flight Attendants out of their jobs. The issue in this case affects TWA and IFFA because it impacts on their continuing bargaining relationship. More directly, the issue affects the industries covered by the Railway Labor Act because of the disruptive effect the decision will have on collective bargaining relationships. The issue affects the Crossover Flight Attendants and other employees found by the courts below to be covered by a "mutilated" collective bargaining agreement containing union security and dues checkoff clauses, because of the impact it has on their associational rights, organizational rights, financial interests, and livelihood. Therefore, the Crossover Flight Attendants are in a unique position to express the interests of the employees caught in a management-union labor dispute.

The Crossover Flight Attendants have secured the consent of TWA to their filing of a brief amicus curiae. This motion is made necessary because IFFA has refused to consent to the filing of the attached brief.

For all of the reasons stated above, it is respectfully requested that the Crossover Flight Attendants be given leave to file the following brief as amicus curiae.

Respectfully submitted,

MARK P. JOHNSON
Counsel of Record
DAVID L. WING
L. CAMILLE HEBERT
of SPENCER, FANE, BRITT & BROWNE
1400 Commerce Bank Building
1000 Walnut Street
Kansas City, Missouri 64106-2140
(816) 474-8100
Attorneys for Amicus Curiae,
Crossover Flight Attendants

No. 86-1650

In the Supreme Court of the United States

OCTOBER TERM, 1987

TRANS WORLD AIRLINES, INC.,
Petitioner,

vs.

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMICUS CURIAE, CROSSOVER FLIGHT ATTENDANTS IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The interest of the amicus curiae is stated in the Motion proceeding this brief and is incorporated herein.

ARGUMENT

I. THE LANGUAGE AND LEGISLATIVE HISTORY OF SECTION 2, ELEVENTH OF THE RAILWAY LABOR ACT MANDATE THAT UNION SECURITY AND DUES CHECKOFF CLAUSES ARE NOT ENFORCEABLE AFTER THE STATED TERM OF THE CONTRACT AND INITIATION OF ECONOMIC STRIKE ACTIVITY

The National Labor Relations Act (NLRA) has long provided persuasive authority on interpretation of the Railway Labor Act (RLA). This is true especially where, as in this case, the case law under the RLA is silent on a controlling question, while case law concerning virtually identical provisions under the NLRA is well developed.[1] The Crossover Flight Attendants urge this Court to refer to and follow the persuasive authority of NLRA case law in reversing the decision of the Eighth Circuit.

The specific issue before the Court is one of statutory interpretation: what is the proper interpretation of RLA Section 2, Eleventh, as it relates to post-contract and post-status quo period enforcement of compulsory union membership? The union security and dues checkoff provisions of the Trans World Airlines-Independent Federation of Flight Attendants collective bargaining agreement are governed by Section 2, Eleventh of the RLA, 45 U.S.C. §152, Eleventh. Section 2, Eleventh was expressly patterned after Sections 8(a)(3) and 302(c)(4) of the NLRA,

1. *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383 (1969). *See also Robinson v. Pan American World Airways*, 777 F.2d 84, 88 (2d Cir. 1985) ("Historically, courts and administrative agencies have looked to the NLRA and case law under it for guidance in interpreting questions arising under the RLA.")

29 U.S.C. §§158(a)(3) and 186(c)(4). A long line of judicial and administrative interpretations of NLRA Sections 8(a)(3) and 302(c)(4) has held that union security and dues checkoff provisions do not survive expiration of the collective bargaining agreement.

Under RLA Section 2, Eleventh, a carrier and the labor organization certified to represent the carrier's employees may enter into union shop and dues checkoff agreements as part of the overall collective bargaining relationship. That provision provides, in pertinent part, as follows:

> . . . any carrier . . . and a labor organization . . . duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—
>
> (a) to make agreements, *requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, which ever is the later, all employees shall become members of the labor organization* representing their craft or class. . .
>
> (b) to make agreements providing for the deduction by such carrier . . . from the wages of its . . . employees in a craft or class and payment to a labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: Provided, that *no such agreement shall be effective with respect to*

> *any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, . . . which shall be revocable in writing after the expiration of one year or upon termination of the applicable collective bargaining agreement, whichever occurs sooner.*

45 U.S.C. §152, Eleventh (a) and (b) (emphasis added).

By comparison, the corresponding language of NLRA Section 8(a)(3) provides, again in pertinent part:

> . . . nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to *require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later,* (i) if such labor organization is the representative of the employees as provided in Section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made. . .

29 U.S.C. §158(a)(3) (emphasis added). Section 2, Eleventh(b) closely follows corresponding "dues checkoff" language in NLRA Section 302(c)(4), which provides:

> (c) The provisions of this section [concerning employer payments to labor organizations] shall not be applicable . . . (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: Provided that *the employer has received from each employee, on whose account deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective bargaining agreement, whichever occurs sooner.* . .

29 U.S.C. §186(c)(4) (emphasis added).

The legislative history of Section 2, Eleventh makes clear that Congress intended that Section 2, Eleventh afford the same rights and protections to employees as those provided by NLRA Sections 8(a)(3) and 302(c)(4). The Committee on Labor and Public Welfare of the Senate stated with reference to S. 3295, the 1951 legislation which added Section 2, Eleventh to the RLA, that "[t]he Labor-Management Relations Act of 1947, by its terms, is not applicable to the railroad or airline industries, but applicable to industry generally. It is the view of your Committee that the terms of S. 3295 are substantially the same as those of the Labor-Management Relations Act as they have been administered. . . ." S. Rep. No. 2262, 81st Cong. 2d Sess., *reprinted in* 1950 U.S. Code Cong. & Ad. News 4319, 4321.[2] Even the Committee members who stated an independent view concerning S. 3295, expressly noted their intention that ". . . the union-shop and check-off conditions of employees of industry covered by the Railway Labor Act . . . be in general accord with the union-shop and check-off conditions of employees of other industry." *Id.* at 4322. In view of the similarity of language between the RLA and NLRA, it is not surprising that Congress intended the interpretation of RLA Section 2, Eleventh to be consistent with NLRA Sections 8(a)(3) and 302(c)(4).

---

2. All of NLRA Section 302(c)(4) and the relevant proviso of NLRA Section 8(a)(3) were added to the NLRA by the Labor-Management Relations Act of 1947. H. R. Rep. No. 510, 80th Cong., 1st Sess., *reprinted in* 1947 U.S. Code Cong. & Ad. News 1135, 1147, 1173.

This Court has held that in general, the extensive body of law developed under the National Labor Relations Act provides persuasive guidance with respect to interpretation of corresponding provisions of the Railway Labor Act,[3] and this evolves from the more general rule of statutory construction that similar statutes shall be construed similarly. *Northcross v. Board of Education of the Memphis City Schools*, 412 U.S. 427 (1973).

This Court has observed that administrative interpretations of regulatory statutes deserve great deference by the courts. In the field of labor law, this Court has specifically held that the courts should accord great weight to NLRB interpretation of the NLRA. *N.L.R.B. v. Truck Drivers Local Union No. 449*, 353 U.S. 87, 96 and n. 28 (1957) (*Buffalo Linen*).

With respect to the particular issue now before the Court, an unbroken line of decisions of the National Labor Relations Board clearly and conclusively holds that union security provisions become unenforceable upon expiration of collective bargaining agreements. *American Thoro-Clean, Ltd.*, 283 NLRB No. 170 (1987); *Peerless Roofing Co., Ltd.*, 247 NLRB 500, 505 (1980), *enf'd*, 641 F.2d 734 (9th Cir. 1981); *Trico Products Corp.*, 238 NLRB 1306, 1308 (1978); *Bethlehem Steel Co.*, 136 NLRB 1500, 1502 (1962), *enf'd in relevant part*, 320 F.2d 615 (3d Cir. 1963), *cert. denied*, 375 U.S. 984 (1964). In a similarly impressive line of cases, the NLRB has held that dues checkoff provisions may not be enforced after contract expiration. *American Thoro-Clean, Ltd., supra; Watson-Rummell Electric Co.*, 277 NLRB No. 162 (1985); *Redway Carriers, Inc.*, 274 NLRB 1359, 1377 (1985); *Hassett Maintenance Corp.*, 260 NLRB 1211 (1982); *Robbins Door & Sash Co., Inc.*, 260 NLRB 659 (1982); *Hudson Chemical Co.*, 258 NLRB 152, 157 (1981); *Bethlehem Steel Co., supra.*

3. See Note 1, *supra*.

In much the same way as an unbroken chain of administrative agency decisions deserves respect from the courts, unanimity of opinion among the Circuit Courts of Appeals deserves consideration by this Court. The Courts of Appeals which have addressed the issue at hand have held that union security and checkoff provisions do not survive expiration of the contract, relying on the National Labor Relations Board's decisions. *Industrial Union of Marine and Shipbuilding Workers of America v. N.L.R.B.*, 320 F.2d 615, 619 (3d Cir. 1963), *enf'g in relevant part*, 136 NLRB 1500 (1962), *cert. denied*, 375 U.S. 984 (1964); *N.L.R.B. v. International Union, United Automobile, Aircraft, and Agricultural Implement Workers of America*, 297 F.2d 272, 274-75 (1st Cir. 1961); *N.L.R.B. v. International Union, United Automobile, Aircraft, and Agricultural Implement Workers of America*, 194 F.2d 698, 701-702 (7th Cir. 1952). Quite simply, union security clauses and dues checkoff provisions are unique creatures of contract, and in the absence of a collective bargaining agreement between the employer and the employees' bargaining representative, union security and dues checkoff obligations are unenforceable.

In other words, TWA could not have enforced the union security and dues checkoff provisions after the contract's expiration and the commencement of the strike even if it had wanted to do so. The effect of those particular clauses had been suspended by operation of law until the parties reach a new agreement.

The Crossover Flight Attendants submit that the decision below ignores the clear language of Section 2, Eleventh and its legislative history and the well-settled ad-

ministrative and judicial interpretation of NLRA Sections 8(a)(3) and 302(c)(4), the statutes after which Section 2, Eleventh were patterned.

II. POLICY CONSIDERATIONS COUNSEL AGAINST THE CONTINUATION OF THE UNION SECURITY AND DUES CHECKOFF CLAUSES

Not only is the Eighth Circuit's position continuing the union security and dues checkoff obligations without support in the language of the RLA, in the almost identical language of the NLRA, and NLRB and judicial decisions thereunder, but the position effectively destroys the individual and collective statutory rights of employees who would choose to return to work during a strike. Additionally, the Circuit's position hinders, rather than advances, the collective bargaining process.

The effect of the Circuit's ruling in this case is to force all TWA employees, including the Crossover Flight Attendants who disagree with IFFA's strike decision, to support IFFA. The right of an employee to resign from the union during the period of a strike is well recognized. *See Pattern Makers' League v. N.L.R.B.*, ____ U.S. ____, 105 S.Ct. 3064 (1985). However, continuation of the union security clause during a strike and the self help period—even if such a clause is the sole provision of a "partial" or "remainder" contract—would mean that a union could preclude employees from refusing to support the union financially, as well as deny them the exercise of their right to refrain from other organizational activities.

Given that IFFA suspends dues payments for strikers but insists upon payment from Crossover Flight Attendants, the anomalous result is that Crossovers are

financing the very strike they oppose as well as IFFA's effort to displace them from the workforce.[4] The economic strike makes this situation radically different from that of a dissident group of union members during a contract term seeking to withhold dues because they disagree with some union policies. The irony here cannot be lost.

The Eighth Circuit position is not only detrimental to the rights of employees who chose to return to work in this case, but it is also detrimental to the very process of collective bargaining under the RLA. First, the result here is to force upon the parties an "Alice in Wonderland" remainder contract that the parties never would have voluntarily or intentionally agreed upon. Even the District Judge referred to the provisions he found had remained in effect as the parties' "mutilated collective bargaining agreement." 640 F.Supp. at 1113 n. 8. Provisions that were perfectly acceptable to both sides when part of a complete agreement are ludicrous when standing alone; the most glaring example of such a provision is the union security clause at issue here.

Second, contrary to its stated intention, the Eighth Circuit's position will hinder the collective bargaining process by forcing the parties to designate every provision for change under RLA Section 6. In continuing all provisions not "noticed" for change under RLA Section 6, the articulated goal of the Circuit and the District Court is to focus bargaining on those provisions truly in dispute. Unfortunately, the opinions below will result in a night-

---

4. In related litigation now pending before the Eighth Circuit on a motion for rehearing (Nos. 86-2197 and 86-2319), IFFA is seeking reinstatement of full term strikers and displacement of strike replacements, including the Crossover Flight Attendants. A panel of the Eighth Circuit has held that full term strikers are to be reemployed based on seniority, displacing Crossovers who worked during the strike.

marish prospect: All provisions will be noticed for change. Rather than allowing the parties by the RLA Section 6 notice process to alert each other as to where significant differences exist and to focus thereon in bargaining, this forced "noticing" of all provisions will mask the parties' true concerns and retard the bargaining process.[5]

Last, if parties do not notice all provisions, the Eighth Circuit position will have the undesired affect of increasing judicial intervention in the bargaining process. Assuming all provisions have not been noticed pursuant to RLA Section 6 and no agreement is reached on the noticed provisions, a new area of dispute will require judicial attention: What provisions were noticed? While at first blush this may seem a relatively simple question to resolve, in fact it can be very complicated. For instance, is provision A noticed for change if a new provision is proposed that would supersede or change the effect of provision A even if provision A is not expressly mentioned in the proposed change? Is a proposed change in a date or a name or a purported "ministerial" change sufficient to preclude the continued operation of the base clause? What about a change that merely updates language to match an existing practice between the parties? Would a proposed change that would add conforming language into provision B if the parties agreed to a substantive change in provision C preclude the continued operation of both provisions? What if a proposed change in provision D

5. The District Court's assumption that parties would rarely or never serve notice of a desire to change every provision, 640 F.Supp. at 1112 n. 5, demonstrates a complete lack of understanding of the bargaining process. Although parties might prefer noticing only a few provisions in which changes need to be made, they cannot and will not do so when the alternative is the continuation of unnoticed provisions in a "mutilated contract". This is not a case of half a loaf being better than none; it is a case of no contract being far preferable to an incomplete and awkward remainder contract.

would necessitate a change in a related provision E, but provision E was not specifically noticed for change? Would provision F continue, even though not noticed, if it refers to a provision that was noticed and that does not continue? What segment of a provision would be deleted if noticed for change? The entire article? Section? Paragraph? Sentence? Phrase? Word? What if provisions that must be changed in due course in a new agreement are not included in the proposed changes because of an implicit assumption that corollary changes will be made to effect the intent of the parties? For example, if the duration clause is not noticed to reflect new dates for the agreement and yet there could not possibly be a new integrated agreement without a change in that clause, will the clause be deemed to be noticed? On the other hand, if the duration clause is noticed for change, would the remainder contract have no specified duration and continue at the will of the parties? The list of issues yet to be resolved if the Eighth Circuit position is affirmed is virtually unlimited. Establishing the basic ground rules could take years of litigation; resolving the slightly more subtle disputes will be done only on a case by case basis.[6]

SUMMARY OF ARGUMENT

Amicus Curiae urges this Court to reverse the Eighth Circuit decision for the following reasons: Neither the language nor legislative history of Section 2, Eleventh of the Railway Labor Act, the corresponding sections of the National Labor Relations Act, or the administrative or

6. Completely apart from the statutory and policy considerations raised in this brief, the Eighth Circuit's decision should be reversed because of the misreading by it and the District Court of *Brotherhood of Railway & Steamship Clerks v. Florida East Coast Railway*, 384 U.S. 238 (1966).

judicial interpretations of those sections support the continuation of union security and dues checkoff clauses after the stated term of the contract and the initiation of self-help; the continuation of those clauses in a strike situation effectively destroys the individual employee's right not to support the union by his or her actions and with his or her financial resources during a strike; and the remainder contract concept of the Eighth Circuit hampers the collective bargaining process, results in a ludicrous and nonsensical set of terms between the parties, and accordingly will force parties to notice all provisions of bargaining agreements for change or risk interminable litigation to resolve what contract provisions continue.

CONCLUSION

For each of the reasons set forth above, Amicus Curiae urges that the decision below of the Eighth Circuit Court of Appeals be reversed.

Respectfully submitted,

MARK P. JOHNSON
Counsel of Record
DAVID L. WING
L. CAMILLE HEBERT
of SPENCER, FANE, BRITT & BROWNE
1400 Commerce Bank Building
1000 Walnut Street
Kansas City, Missouri 64106-2140
(816) 474-8100
Attorneys for Amicus Curiae,
Crossover Flight Attendants

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Motion for Leave to File and Brief of Amicus Curiae, Crossover Flight Attendants in Support of Petitioner, were mailed by first class mail, postage prepaid, to Stephen A. Fehr, Esq., 204 West Linwood Blvd., Kansas City, Missouri 64111, Counsel of Record for Respondent Independent Federation of Flight Attendants, and Murray Gartner, Esq., 300 Park Avenue, New York, New York 10022, and Paul E. Donnelly, Esq., P.O. Box 19251, Kansas City, Missouri 64105, Counsel for Petitioner Trans World Airlines, this 12th day of August, 1987.

/s/ MARK P. JOHNSON

APPENDIX A

Debra Aahutz
A. Abadji
Abraham Abyad
Betzy M. Ackermann
Bernadette Adamujh
Diana Agee
Eric Aguayo
Natalie Aguayo
Chantal M. Alexander
Geri Alexander
Teri Alexander
Susan M. Allen
Lanna Amidon
Terry Anderson
Therese M. Anderson
Anthony Antapasis
Margaret Antapasis
Judith Atwood-Wells
Terrie Bacchi
Eileen Backme
Zygmunt J. Baczynski
Pamela C. Baez
Ferd Bailey
Jeff Bailey
Karen Bailey
Julie Baldwin
Jeannine Balsamo
Tony Barbatti
Eugene Barnes
Marilyn Barnett
Pat Barnholtz
Margaret Bartell
Ruth A. Bartels

Sherry Lynn Bates
Ann Beam
Michel Belliard
Gil Bernal
Katy Bessinger
Kathleen Best
Freddy Beynon
Joann Bickerton
Diana Bittiker
Barbara Black
Betty Bland
Patricia Bocchino
Arleen Bodney
Anthony Boggiano
Joan Bonniwell
Julia K. Bourland
Jo Bowers-Haitbrink
Patricia Bowers-Thomas
William Bowman
F. Charlene Bradshaw
Susan L. Bridge
Kristi A. Briggs
Ellen Brinkley
Sharon Brioza
Linda L. Britton
Eva Von BromssenLowe
Ann Brooks
Virginia A. Broome
Julia H. Brown
Sherry Brown
Sue Brown
Roger Bugrave
Thomas Craig Burfield
Terri Burgess
Linda R. Burton

David Cabrera
Anne Marie Campbell
C. M. Campbell
Lois Campiformio
Michael D. Carroll
Vera Carter
Carol Cassidy
Mary Chapman
Joan Chaput-Negrao
Wesley Chelland
Mark Cherryhomes
Barbara Chrisman
Martie Christensen
Renee M. Cigich
Marilyn A. Clark
Terry Coble
Karen Cogan
Carole Coleman
B. J. Collins
David Collins
Janet H. Collins
Tiffany Combes
Sheila Conlin
Linda Conover
Merv Conover
Brenda Sue Cooper
Lee Costanzo
Elaine Costelo
Brian Coward
David Crain
Linda Crain
Vicky Crockett
Cheryl L. Crone
Diane Cunard
Beverly J. Cundiff

Brian Curran D'Emilio
Emilee M. Daily
Bernard DeSimone
Marilyn K. DeWitt
Duane Decker
Terryl Dedinsky
Uli Deridison
Kathrine Devlin
David Dicks
Kathleen Dillon
Larry Dingman
Linda L. Domanico
Louis Donde
E. A. Dougherty
Thomas Douthitt
David Dozier
Natalie Duke
Judith Dumbra
Anothai Eanchi
P. A. Eason-Colon
Jane E. Edmunds
Janis H. Edwards
Jeanne Egut
Christine Ehnes
Anne Ellington
Jeana K. Elliott
Vreny F. Elmer
Nancy England-Scott
Joan Eusani
Kay Evans-Cooke
Jacquelyn M. Falk
Dreama Farr
Carole S. Faurell
Etienne Faverey
Ilene Feder

Leslie Ferguson
Tahirin Alexander Fetters
Ken Fisher
Kathy M. Fleming
Carolyn Fletcher
Deborah Kruse Flowers
Carole Forrester
Cheri Franchett
Bruce A. Frazier
Janice Freid
Rita Frisch
Margaret Gajewski
Everett Gardner
Vicky Lynn Garner
Debra Gebow
David Gifford
Jerri L. Giles
Gala Gillespie
Sheena Gillespie
Howard B. Glasgow
Janice Glowacki
Leona M. Goebel
Yolanda de Golian
Sharon Gorman
Ernesto Graeser
Jeanne Grauff
Patricia Graves
Cynthia Gray
Marsha A. Greenwall
Julia B. Griggs
Michele Guido
Kathleen Gutermuth
Beth Hailicka
Dee Halagera

Denise A. Hall
Janice Dodgson Hall
Virginia Hall
Jackie Hamil
Carina Hamilton
Glen Hamilton
Sandy Hammersley
Doretta Hampton
Leif Hansen
Paula Happe
Edward D. Harding
Susan Hasty
Vivian Hatfield
Mayleen Zagami Hayes
Augenea L. Heale
Denise M. Healy
Patty Heaston
Michael G. Hede
Paula Von Hedrich
Patricia Heron
Dianne Herrick
Marie Hilleband
Roberta Hingson-Gates
Debra Hinkle
Jill Hodgson
Sally J. Holbrook
Paulette Horr
Eugenia Horton
Diana Hubbert
Lynn Huff
Peggy Hulbert
Jara Humbert
Sally Humphreys
Nancy Carole Hunnewell

Mary Ann Hunter
Janan Huntsberry
Gayle Hurst
Kathren Hurst
Tanya L. Jackson
Vuran Jefferson
Liz Jensen
Becky John
Donna Johnson
Kristy R. Johnson
Linda Jolly
Edie Kaelin
Linnea Kalahurka
Staci L. Kaplan
Shelley Kawakami
Ginette Kayser
Rayplow H. King
Barbara Kingry
Elaine Kinker
John P. Kirk
DeLynn Klosterhoff
Sue Kloza
Jacquelyn L. Knott
Sandy Knudson
Jill Koch
Toula Kordalis
Donna Kosta
Inge Krolikowski
M. Kumec
Faythe E. Laatsch-Coley
Sharon A. Lamb
Monica Lane
Ingrid Langner-Abraham
Pamela Lanigan
Betsy Lanz

Robert L. Latimer
Nancy Lawing
Keith Lawn
Peter Lee
Christina Leontsinis
M. Lifsey
Barbara Jean Liptok
Sandra Lisciotti
Delilah M. Lloyd
Joao Lobeto
Patricia Lofstrand
Edwina Lum
John A. Lyons
Maria Mackey
Laura B. Madden
Leslie Madden
Susan Madigan
Judy A. Malespino
Robert E. Mallicoat
Cheryl Maly
Sue Mangus
Dorothy L. Marchetti
Jeannie Martin
Michele Martin
Nancy Martorelli
Kenn R. Marx
Yvonne L. Massie
Shirley Matthews
Kim W. Mayer
Karen McAffee
Pat McBride
Laurie McCarroll
Kathleen McClure
Nancy K. McConaghy
Cheri McCullough

Esther McDermott
Patricia McGowan
Paul T. McGowan
Des McGuire
Julie McKrell
Terrie L. McLain
Patricia S. McLean
Laurie McMillan
Linda McMillan
Russell McMillan
Kim McNeal
Christine McNeely
Ellen McNeill
Luella Medlin
Judith Melgar
Karen Merry
France Mesureur
Caroline Meyer
Judi A. Meyer
Clive Miller
Dominick Mineo
Betty Mingauw
Sherry Missig
Patti Mittelman
Anna Del Moline
Henry Moore
Nadine B. Morelock
Kelly Morgan
Verna P. Morrison
Mark P. Moscicki
Ursula J. Muench
Suzette Mullins
Victoria Mullins
Barbara Murphy
Jake J. Murray

James P. Nagle
Daryl Nairn
Diane L. Nelson
Gladys R. Nelson
Edna Newrick
Bonnie Newson
Phyllis J. Nichol
Dorothy A. Nicolai
Charlene R. Nielson
Carol Noel
Barbara Nogueira
JoAnn Nunley
Carolyn O'Brien
Jena Dee O'Donnell
Grit O'Hara
Kathryn H. Odgon
F. Coleman Ogdon, III
Marie Olsen-Oskins
Andrea Orlich
Gerda Orloff
Jeffrey L. Orloff
Susan Overmiller
Jeannette L. Owens
Mike Pablos
Susan Pace-Picone
P. A. Padilla
Bruce Palmer
Dwayne Pearson
Pat Pendleton
Y. Penna-Zager
Maggie Pennington
Marcia Perry
Lisa Peterson
Paula Petkovsek
Cora Phillips

Stan Phillips
Carolyn Pider
Elsteth Pierce
Dotti Pierson
Kathy Pietoso
Rosa Pinto
Marcia Pirie
Tony Piruzza
Barbara L. Porter
Wayne Pretschold
Angela Price
Jonathan H. Proctor
Miriam Proud
Ed M. Przybyla
Lueda Purtymun
Ann G. Quick
Lynn Rammler
Isabel Ratto
Bernadine Reid
Sharon Reiss
Constance L. Reynolds
Jerry Rheams
Patricia J. Rice
Sheila K. Rice
Pam Ridings
Halina Ridpath
Barbara Riegler
June Rio
Roxie Robin
Gabriele E. Robinson
Denise Rock
Valeria Rogers
Judy Lynn Rose
Linda Rosenthal
Saundra F. Roth

Wanda Ruckman
Ralph R. Rugal
Mary Ann Ryan-Brennan
Monica Saadia
Mary Sanders
Cheri Scheid
Susan Schilligo
Gigi Schmidt
Anne Schnapp
Carol A. Schoeming
Betty Anne Schwane
Patricia Scott
Bernadette B. Scott
Luana J. Scott
Mary Sebastian
Lynnette C. Seehausen
Nancy Sellers
Dolph Selton
Mary Selton
Eden Horn Sergent
Jo Shirkey
Diane Shutt
Tadd Siano
Kelly Sibley
A. Smith
Sandra Smith
Norine Smock
Mary Jane Sniegowski
Jackie Snow
Frank Soares
Michelle Sodaro
Donald J. Soja
Margaret Somerville
Kenna Spain
Teresa Spino

Jeanne Standifur
Lorel Stanford
Nancy Ann Steele
Helene Stephenson
Tom Stewart
Diane Stitt
Marty Stockton
Linda Stumpf
M. L. Sudduth
Gail Summerfield
James T. Summers
Cindy Swearingen
Cathy Szczeblowski
Betty Y. Taggart
M. Toni Tahoun
Marilyn Tams
Lee Taylor
Mary Pat Taylor
Greg Teal
Anothai Teanchai
Karin Tempesta
Sharon Thomas
Linda S. Thompson
Virginia Thomsen
Alice Tobin
Jerry Tonini
Shelley Tork
Trudy Trexler
Peggy Turk
Janet Tursi
Ann Urbanich
Toma Usrey
Joanne Vandervoort
Randy Vaughan

Marie Des Verney
Deborah Anne Vinci
Teresa Volk
Judith A. Vryland
Anne Vuernick
Charlotte Vuichard
Arline Wacha
Carlett Wachter
Jon Wahl
Karla Wallace
Lesley Webster-Corbett
Linda Weih
Barbara Weinacht
D. E. Wells
Darlene Whicher
Jeri L. White
Mary Whitfill
Margo Whyte
Barbara Wickenhagen
Mandy Wilburn
Susan Wilken
Byron Willey
Denise Williams
Nancy Williams
Suzi E. Williams
Veronica Williams
Mary Frances Urbancik Wilson
P. J. Wisdon
Kim Wisner
Ellie Wohnarowsky
Georgia Wooldridge
Bonnie Yoder
Cheryl Young
Patrick W. Zullig

AMICUS CURIAE

BRIEF

MOTION FILED
AUG 13

No. 86-1650

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

TRANS WORLD AIRLINES, INC.,
Petitioner,

v.

INDEPENDENT FEDERATION
OF FLIGHT ATTENDANTS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF OF SOME WORKING TWA FLIGHT ATTENDANTS (REAL-PARTIES-IN-INTEREST) AS AMICUS CURIAE IN SUPPORT OF PETITIONER

ROBERT F. GORE, Esquire
ROSSIE D. ALSTON, JR., Esquire
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

Counsel for Some Working Flight Attendants

Of Counsel:

REX H. REED, Esquire
National Right to Work
Legal Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160

August 13, 1987

No. 86-1650

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

TRANS WORLD AIRLINES, INC.,
Petitioner,
v.
INDEPENDENT FEDERATION
OF FLIGHT ATTENDANTS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE A BRIEF BY SOME WORKING TWA FLIGHT ATTENDANTS (REAL-PARTIES-IN-INTEREST) AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Timothy Burch, Kathryn Carey, Shirley Fonseca, Christine Gotay, Deanna Myer, Mary Selton, Randolph Selton, and other "working" TWA flight attendants move for leave to file the accompanying brief *amicus curiae* in support of the petitioner in this case.

Movants are some of the approximately 4,200 TWA flight attendants who *worked* during the bitter 1986 strike between the respondent Independent Federation of Flight Attendants ("IFFA") and the petitioner Trans

• The movants sought permission from both parties to file an Amicus Curiae brief. The respondent labor union denied permission.

World Airlines, Inc. ("TWA"). Some of the Movants are flight attendants who abandoned the strike, crossed the union's picket lines, and returned to work.[1] The other Movants are flight attendants hired by TWA as permanent replacements during the strike.[2] Because the Movants and other flight attendants chose to work during the strike, they were reviled, threatened and assaulted by "striking" employees. Although the respondent union has called off its strike, it has continued to utilize its resources to have the "working" flight attendants displaced by its members who remained on strike.

Notwithstanding the fierce animosity between the respondent union and the "working" flight attendants, the courts below construed the Railway Labor Act ("RLA" or "the Act"), 45 U.S.C. § 151 *et seq.* (1982), to require that the "working" flight attendants comply with the union security provision of the 1981-84 TWA/IFFA collective bargaining agreement. Accordingly, the "working" flight attendants—in order to keep their jobs—must financially support the respondent union's efforts to destroy them. From the foregoing it is obvious that the Movants are "real-parties-in-interest" who have been injured by the decisions of the courts below.

The *Question Presented* in the Petition for Certiorari is whether the union security provision of the 1981-84

---

[1] In the decisions below, flight attendants who abandoned the strike and returned to work are commonly referred to as "crossovers." This practice will be continued in this brief.

[2] The flight attendants hired by TWA as permanent replacements are commonly referred to as "new hires." Throughout the remainder of this motion and accompanying brief, the "crossovers" and the "new hires" will be referred to as the "working" flight attendants vis-a-vis TWA's flight attendants who were "striking."

agreement remained in effect after the stated term of the contract *and* after the parties had been released to engage in "self-help." The Movants presume that because the parties in this case are primarily concerned with their own institutional interests, their arguments will naturally focus on the traditional labor law conflict between "employer rights" and "union rights," largely leaving out of consideration the interests of the individual workers caught up in this bitter labor dispute.

As they did in the lower courts, the carrier and the union will undoubtedly focus their arguments on:

(1) whether the RLA permits fixed-term contracts; and

(2) whether a union security provision of a prior contract, that was not the subject of either a "Section 6 Notice" or the unsuccessful negotiations for a successor contract, becomes ineffective, as a matter of law, when the parties complete the bargaining procedures of the Act and are released to "self-help."

While these issues are certainly important to carriers, labor unions, and future negotiations under the Act, the Movants' concerns are more immediate and personal.

Rather than focusing on how labor and management will negotiate future agreements, Movants' arguments will focus on the devastating impact of union security agreements on employee rights, especially when there remains a deep, bitter schism within the bargaining unit. When viewed through the eyes of the loyal employees who worked during the strike, the inequity of requiring that they financially support the bargaining agent's efforts against them is readily apparent.

The Movants will show that enforcement of the union security provision of the 1981-84 TWA/IFFA collective bargaining agreement against the "working" flight attendants:

(1) is contrary to the intent of Congress when it amended the Railway Labor Act to sanction union security agreements;

(2) is inconsistent with holdings construing the union security provisions of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (1982); and

(3) is totally at odds with any concept of fairness or equity!

It is respectfully submitted that Movants' insights will aid the Court in reaching an appropriate result in this case.

CONCLUSION

For the above stated reasons, this motion for leave to file a brief *amicus curiae* should be granted.

Respectfully submitted,

ROBERT F. GORE, Esquire
ROSSIE D. ALSTON, JR., Esquire
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510
Counsel for Some Working Flight Attendants

Of Counsel:

REX H. REED, Esquire
National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160

August 13, 1987

TABLE OF CONTENTS

Page

INTEREST OF THE AMICUS CURIAE 1

FACTUAL BACKGROUND 2

SUMMARY OF ARGUMENT 6

ARGUMENT 9

A. CONGRESS, IN AUTHORIZING UNION SECURITY AGREEMENTS, DID NOT INTEND THAT SUCH AGREEMENTS SERVE AS WEAPONS TO COERCE NONUNION EMPLOYEES INTO FUNDING UNION ACTIVITIES WHICH ARE CLEARLY DETRIMENTAL TO THEIR INTERESTS 9

B. UNION SECURITY AGREEMENTS UNDER THE RAILWAY LABOR ACT SHOULD BE CONSTRUED IN THE SAME MANNER AS UNION SECURITY AGREEMENTS UNDER THE NATIONAL LABOR RELATIONS ACT ... 15

C. ENFORCEMENT OF A UNION SECURITY AGREEMENT UNDER THE FACTS OF THIS CASE IS FUNDAMENTALLY UNFAIR AND INEQUITABLE 18

CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Page

Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1969) 15

Dean v. Trans World Airlines, Inc., 708 F.2d 486 (9th Cir.), cert. denied, 464 U.S. 995 (1983) 2

Ellis v. Brotherhood of Railway Clerks, 466 U.S. 435 (1984) 6, 11

Ford Motor Co. v. Huffman, 345 U.S. 330 (1952) ... 12

International Association of Machinists v. Street, 367 U.S. 740 (1961) 11

LeBoutillier v. Air Line Pilots Association, 778 F.2d 883 (D.C. Cir. 1985) 2

NLRB v. Cauthorne, 691 F.2d 1023 (D.C. Cir. 1982) 17

NLRB v. Haberman Construction Co., 618 F.2d 288 (5th Cir. 1980) 17

NLRB v. Katz, 369 U.S. 736 (1962) 17

Railway Employes' Dept. v. Hanson, 351 U.S. 225 (1956) 10, 14

TABLE OF AUTHORITIES—continued

Page

Southwestern Steel & Supply, Inc. v. NLRB, 806 F.2d 1111 (D.C. Cir. 1986) 17

Steele v. Louisville & Nashville Railroad, 323 U.S. 192 (1944) 13

Vaca v. Sipes, 386 U.S. 171 (1967) 13

Statutes

National Labor Relations Act, 28 U.S.C. § 28 U.S.C. 151 et seq. (1982) ..... passim

Railway Labor Act, 45 U.S.C. § 151 et seq. (1982) ..... passim

Miscellaneous

Haggard, T., COMPULSORY UNIONISM, THE NLRB, AND THE COURTS: A Legal Analysis of Union Security Agreements, (Labor Relations and Public Policy Series No. 15, The Wharton School, 1978) 9

National Mediation Board, THE RAILWAY LABOR ACT AT FIFTY: Collective Bargaining in the Railroad and Airline Industries, (C. Rehmus ed. 1977) 9

S. REP. NO. 2262, 81st Cong., 2d Sess. 3 (1950) 15

No. 86-1650

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

TRANS WORLD AIRLINES, INC.,
Petitioner,

v.

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF SOME WORKING TWA FLIGHT ATTENDANTS (REAL-PARTIES-IN-INTEREST) AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

This short brief *amicus curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the "working" flight attendants/ Movants is set forth in that motion.

While fully supporting the arguments of the petitioner Trans World Airlines, Inc. ("TWA"), the Movants would urge the Court to consider the following additional reasons why the lower courts erred in holding that TWA's

"working" flight attendants were required to abide by the union security provision of the 1981-84 collective bargaining agreement.

FACTUAL BACKGROUND

Section 2 Eleventh of the Railway Labor Act ("RLA" or "the Act"), 45 U.S.C. § 2(11) (1982), authorizes carriers and labor unions to negotiate union security agreements requiring that all employees in the bargaining unit join or support the union serving as the exclusive bargaining representative. Since 1976, TWA has negotiated and enforced [1] union security agreements with the various labor unions representing its employees. The 1981-84 TWA agreement with the respondent union, the Independent Federation of Flight Attendants ("IFFA"), contained such a provision. (Cert. Pet. 66-67a).

In the spring of 1984, when TWA and IFFA opened negotiations for a successor contract, neither party served notice that it desired to modify or amend the union security provision. Their subsequent negotiations never covered this subject. Union security was simply not an issue, both parties apparently willing to continue the practice *if they could reach a successful agreement.*

Unfortunately, the parties were unable to successfully negotiate a new collective bargaining agreement. Numerous factors undoubtedly contributed to this failure at the bargaining table, including the devastating impact of airline deregulation on TWA's market share, the resulting loss of millions of dollars with the possibility that TWA

[1] See, e.g., *Dean v. Trans World Airlines*, 708 F.2d 486 (9th Cir.), *cert. denied*, 464 U.S. 995 (1983); *LeBoutillier v. Air Line Pilots Ass'n.*, 778 F.2d 883 (D.C. Cir. 1985).

might become bankrupt, the attempted corporate takeover and eventual "cinderella" rescue by a "white knight," the negotiations of concessionary contracts with TWA's other unions, and the hard bargaining attitudes of the parties. For whatever reasons, and despite the good offices of the National Mediation Board ("NMB"), the parties never were able to forge a successor agreement.

On February 4, 1986, after almost two years of bargaining, the NMB released the parties and notified them that the statutory 30-day "cooling off" period had commenced. At the end of that period IFFA commenced a strike against TWA. It also filed a lawsuit alleging that TWA had failed to bargain in good faith. TWA countered by implementing new work rules and rates of pay. The unions representing other TWA bargaining units refused to support IFFA's strike and crossed its picket lines. And, most importantly, TWA BEGAN HIRING PERMANENT REPLACEMENTS for the striking flight attendants. (Cert. Pet. 5).

Although each of these actions was probably lawful, they created serious dilemmas for the individual flight attendants. Which side had the economic power to ultimately prevail? And of critical importance—was the strike an "unfair labor practice" strike guaranteeing strikers an absolute right to displace the permanent replacements, or was it an "economic" strike giving the permanent replacements priority employment? Each flight attendant was confronted with a difficult choice—whether to support the union and hope that it ultimately prevailed or to support TWA and obtain job security.

During the strike, some 1,280 flight attendants decided to protect their jobs. They abandoned the strike and

crossed IFFA's picket lines to work (or never joined the strike). Additionally, during the strike TWA hired some 2,800 new flight attendants as permanent replacements. (Cert. Pet. 113-14a).

Many of the crossover flight attendants attempted to resign their union membership but IFFA refused to honor such resignations. During the strike, the "working" flight attendants were harassed, threatened, and assaulted.[2] Many had to change to unlisted telephone numbers to stop the constant telephone harassment. Some had their homes picketed and leafletted. Most of the "working" flight attendants feared for their own safety and that of their families.

While the strike was in progress, the union demanded that TWA enforce the union security agreement of the 1981-84 contract and require that the "working" flight attendants (both cross-overs and new hires) join or support the union. TWA refused on the grounds that, by its very terms, the 1981-84 contract expired when the statutory "Section 6 notices" were served in 1984, and that it would be unlawful[3] to enforce the union security provision after the parties had been released to "self-help" and the status quo period had expired. TWA subsequently

[2] See, e.g., Affidavits of Lopez-Bruner, Zesiger, and Debever in Support of [the Crossovers'] Motion To Intervene And To Modify The [Eighth Circuit's] August 26, 1986 Order; TWA's Motion For Expedited Appeal And For Stay Of Enforcement Pending Appeal, pp. 5-6, 8th Circuit Docket 86-1998.

[3] Sections 2 Fourth, Tenth, and Eleventh combine to make it unlawful for a carrier: (1) to influence or coerce employees to join or remain members of a labor union unless there is a valid union security agreement in effect; or (2) to deduct union dues from an employee's wages unless that employee has executed a written, voluntary "checkoff" authorization.

filed this action seeking a declaratory judgment on its responsibilities under the union security provision of the 1981-84 agreement.

On May 17, 1986, the respondent union offered, on behalf of the striking flight attendants, to return to work. However, by that time TWA had almost a full complement of "working" flight attendants and the vast majority of the striking flight attendants were not recalled but placed on a preferential hiring list. IFFA then filed an additional lawsuit alleging that even if the strike had been an "economic strike," its members should be allowed to use their seniority to displace more junior "crossover" flight attendants. Notwithstanding its offer to return to work, the respondent union has continued to picket, boycott and engage in other forms of self-help against TWA.

The bitter 70-day strike created a deep schism within the bargaining unit. There are over 9,000 employees vying for the approximately 4,500 available jobs. Old friendships and working relationships are totally destroyed. The flight attendant group is divided into two camps—the approximately 4,200 "working" flight attendants who did not support the union, and the remaining flight attendants (most of whom are out of work) who ardently supported the strike. Since its members have offered to return to work, IFFA has devoted a great deal of its resources in efforts to have its members displace the "working" flight attendants; the flight attendant bargaining unit remains deeply fragmented.

The courts below held that the union security provision of the 1981-84 agreement remains in effect and applies to the "working" flight attendants. Under that

agreement, the "working" flight attendants, in order to keep their jobs, must financially support IFFA's activities—even though those activities are clearly detrimental to their long-term interests. Presently IFFA is using the compulsory dues of the "working" flight attendants to finance this lawsuit (and other litigation designed to have its members replace the "working" flight attendants) and to support its continuing economic actions against TWA.

For the reasons listed below, as well as those put forth by the petitioner, it is respectfully submitted that the court below erred in holding that federal labor policy requires that "working" flight attendants financially support the union's efforts to destroy their employment opportunities.

SUMMARY OF ARGUMENT

Congress, in authorizing union security agreements, did not intend such agreements to be used as weapons to compel financial support from non-union employees where the bargaining representative's efforts are directed at the destruction of the employment opportunities of those nonunion employees. Congress authorized union security agreements for a very limited purpose—the elimination of "free riders." The legislative history of Section 2 Eleventh makes it abundantly clear that Congress authorized carriers and unions to negotiate agreements compelling all employees receiving benefits from a union's bargaining efforts to pay their fair share of the union's costs on their behalf. Nonunion employees could not be compelled to support all union activities but rather could limit their financial support to those union activities directly related to its representation of the bargaining unit. *Ellis v. Brotherhood of Railway Clerks*, 466 U.S. 435 (1984).

In the case at bar, the "working" flight attendants are not "free riders" and the union's efforts are not designed to provide any benefits for them. Quite the contrary, the union is using their monies in an effort to destroy their job opportunities. Enforcement of a union security agreement under these circumstances is contrary to the intent of Congress. *A fortiori*, the courts below erred in enforcing the union security provision of the 1981-84 TWA/IFFA agreement against the "working" flight attendants.

Union security agreements negotiated pursuant to the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(3) (1982), have been narrowly construed and have been held to be unenforceable following a hiatus between collective bargaining agreements. Since Congress specifically patterned RLA Section 2 Eleventh after Section 8(a)(3) of the NLRA and since both sections are intended to accomplish the same purpose, they should receive similar constructions. A narrow construction of union security agreements would best reflect the intent of Congress and also provide a consistent national labor policy.

Under existing National Labor Relations Board ("NLRB") precedents, the 1981-84 union security agreement between TWA and IFFA would have become ineffective once the parties were free to take economic actions. A ruling that union security agreements become unenforceable during and after a strike is totally consistent with employee freedom of association, one of the general purposes of both federal labor statutes. Employees—the real soldiers in the economic war between labor and management—should be free to support either the union or the employer during a strike, regardless of

whether that dispute arises under the NLRA or the RLA. Compulsory unionism agreements have no place in such a labor dispute for they deprive employees of freedom of choice at the very time when they need it most—when their very livelihoods are at stake.

It is respectfully submitted that the courts below erred in not following the rationale of the NLRB precedents. By holding that the 1981-84 union security agreement remained in effect, the courts below have deprived the "working" flight attendants of freedom of association—a fundamental right provided by both the RLA and the NLRA. *See* 45 U.S.C. § 151 (1982) and 28 U.S.C. § 157 (1982). The Court should follow the lead of the NLRB and hold that union security agreements are unenforceable once the parties are free to engage in economic actions.

Finally, as a matter of equity, the Court should not construe Section 2 Eleventh of the Railway Labor Act to authorize compulsory financial support of a labor organization's efforts to punish employees for having worked during a labor dispute. Although the union's efforts are directed at improving the plight of its members, its actions, if successful, will punish the other bargaining unit employees. The union has an inherent conflict of interest, and it should not be allowed to compel workers to fund their own demise. During the strike all of the flight attendants were subjected to tremendous economic and social pressures. Each one had to make a difficult decision. Unfortunately, the bitterness and pain flowing from those decisions will last for many years. Nonetheless, the Court should not take sides in this labor dispute. There is no reason to compel the non-union em-

ployees to financially support their antagonist. Such a holding would neither improve labor-management relations nor further national labor policy.

As a matter of equity, the Court should leave the parties where they were at the end of the strike and allow them to ultimately solve their own problems—without compulsion or interference by the federal government.

ARGUMENT

A. Congress, in authorizing union security agreements under the Railway Labor Act, did not intend that such agreements serve as weapons to coerce nonunion employees into funding union activities which are clearly detrimental to their interests.

Since the early 19th century the American labor movement has struggled long and hard, first to obtain, and then to retain, the right to be recognized as the representative of its members and other employees. Historically, one of labor's most effective weapons in maintaining its position as the employees' representative proved to be the negotiation of union security agreements requiring that all employees be members of the union.[4] Since compulsory membership in any organization was antithetical to the American ideal of complete freedom of association, Congress, in enacting the federal

[4] These historical facts are based on T. Haggard, *COMPULSORY UNIONISM, THE NLRB, AND THE COURTS: A Legal Analysis of Union Security Agreements,* (Labor Relations and Public Policy Series No. 15, The Wharton School, 1978), and National Mediation Board, *THE RAILWAY LABOR ACT AT FIFTY: Collective Bargaining in the Railroad and Airline Industries,* (C. Rehmus ed. 1977).

labor laws, limited labor's right to compel "membership" in the union as a condition of employment.[5]

As originally enacted, the RLA made no references to the legality of union security agreements. Act of May 20, 1926, ch. 347 §§ 1-11, 44 Stat. 577. However, in 1934, Congress amended the Act and outlawed all forms of union security agreements. Act of June 21, 1934, ch. 291 § 11, 48 Stat. 1185 (repealed 1951).

As the Court pointed out in *Railway Employes' Dept. v. Hanson*, 351 U.S. 225, 231 (1956), the legislative history of the 1934 amendments clearly indicated that Congress intended that employees should have complete freedom of association.[6] It banned union security agreements because carriers were using such agreements to deprive employees of freedom of association by establishing and maintaining "company" unions.

However, by 1950 company unions were no longer a threat to employee freedom of association, and the railroad unions sought legislation allowing them to negotiate union security agreements requiring that all employees *share in the costs of collective bargaining*. The Act was amended in 1951 by adding Section 2 Eleventh authorizing carriers and labor unions to negotiate union security agreements. Act of Jan. 10, 1951, ch. 1220, 44 Stat. 577 (1951). Under such agreements, all employees in the bargaining unit could be required to financially support the

[5] See, e.g., Section 8(a)(3) of the NLRA, 28 U.S.C. § 158(a)(3) (1982); Section 2 Eleventh of the RLA, 28 U.S.C. § 152 (1982).

[6] Section 2 of the Act was amended to read, "The purposes of the Act are: . . . (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; . . . ."

exclusive bargaining representative as a condition of continued employment. In *International Association of Machinists v. Street*, 367 U.S. 740 (1961), the Court reviewed the legislative history of Section 2 Eleventh and stated:

> [The unions] maintained that because of the expense of performing their duties in the congressional scheme, fairness justified the spreading of the costs to all employees who benefited. They thus advanced as their purpose the elimination of the "free riders"—those employees who obtained the benefits of the unions' participation in the machinery of the Act without financially supporting the unions.
>
> . . . .
>
> This argument was decisive with Congress . . . .
>
> . . . .
>
> . . . [I]t is abundantly clear that Congress did not completely abandon the policy of full freedom of choice embodied in the 1934 Act, but rather made inroads on it for the limited purpose of eliminating the problems created by the "free rider."

Id. at 761, 762, 767. Although the Court in *Street* did not delineate the precise limits, it pointed out that Congress had not vested the unions with unlimited power to spend monies exacted under union security clauses and indicated that exacted monies could *not* be used for purposes which were outside the reasons advanced by the unions and accepted by Congress to justify the authorization of union security agreements. *Id.* at 768. *E.g.*, *Ellis v. Brotherhood of Railway Clerks*, 466 U.S. at 446 (1984).

It is the contention of the *amicus curiae* that the court below erred in construing national labor policy to

require that the "working" flight attendants financially support union activities which are diametrically opposed to their best interests. Congress, in enacting Section 2 Eleventh, was concerned with the problem of "free riders" and with ensuring that all employees who *benefitted* from the union's activities on their behalf pay their fair share. There is absolutely no basis for inferring that Congress believed union security agreements[7] could be used to coerce nonunion employees into financially supporting union activities which were detrimental to their best interests.

Although there will never be complete unanimity within a bargaining unit and there will almost always be some employees who disagree with a union's decisions, the union is accorded a wide range of reasonableness in representing the employees, *so long as it makes an honest effort to serve the interests of all without hostility*. *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1952). So long as the union's actions are not hostile to the interests of the bargaining unit employees, Section 2 Eleventh authorizes compulsory financial support by all members of the unit. It does not follow, however, that Congress intended that a union's *hostile* actions against the best interests of a significant portion of the bargaining unit qualifies for compulsory financial support—especially from the very employees who are being damaged by the union's hostile acts. In other contexts, the Court has held that a union breaches its duty of fair representation by

[7] Although this discussion assumes the continued existence of the 1981-84 agreement, the "working" flight attendants fully support the petitioner's contention that the entire agreement, including the union security provision, expired by its own terms, and the union security provision could no longer be enforced once the parties were relieved from maintaining the status quo and were free to take economic action.

such hostile actions. *See, e.g., Steele v. Louisville & Nashville Railroad*, 323 U.S. 192 (1944); *Vaca v. Sipes*, 386 U.S. 171 (1967). This is not a duty of fair representation case; the issue is raised only to point out the inconsistency of requiring employees to financially support union activities when it is quite likely that those very activities would constitute a breach of the union's duty of fair representation towards those employees.

In the case at bar, the union has struggled through a long, bitter strike and most of its members are now out of work, having been replaced by nonunion employees. Also, some 1,200 of its members abandoned the strike and returned to work. The union's efforts on behalf of its remaining members is both understandable and laudable. However, its actions are quite clearly detrimental to the interests of the "working" flight attendants. The union has an inherent conflict of interest and cannot fairly represent the interests of both its members and the "working" flight attendants. Since the "working" flight attendants are not "free riders" and are not benefitting from the union's efforts, there is no reason to require compulsory financial support of the union. Congress did not intend union security agreements to apply to situations where there is a complete schism within the bargaining unit, and the "working" flight attendants should not be required to fund their own destruction. Justice Douglas' opinion in *Street* is instructive:

> Once an association with others is compelled by the facts of life, special safeguards are necessary lest the spirit of the First, Fourth, and Fifth Amendments be lost and we all succumb to regimentation. . . . If an association is compelled, the individual should not be forced to surrender any matters of

> conscience, belief, or expression. He should be allowed to enter the group with his own flag flying, whether it be religious, political, or philosophical; nothing that the group does should deprive him of the privilege of preserving and expressing his agreement, disagreement, or dissent, whether it coincides with the view of the group, or conflicts with it in minor or major ways; *and he should not be required to finance the promotion of causes with which he disagrees.*

367 U.S., at 776 (Douglas, J., concurring).

It is respectfully submitted that under the facts of this case, enforcement of the 1981-84 TWA/IFFA union security agreement, if it was still in effect, would be inconsistent with the purposes of the Railway Labor Act. The "working" flight attendants are not "free riders." In fact quite the contrary is true. It is the union which is enjoying the "free ride." The bulk of its members are unemployed and not required to pay dues. Because of the rulings in the courts below, the union now receives the bulk of its financial support from the nonunion "working" flight attendants. The union then turns around and uses that money to support its efforts to have the "working" flight attendants removed from the job and replaced by union members. Query: who is receiving a benefit without paying for it?—certainly not the "working" flight attendants.

During the debates on Section 2 Eleventh, Senator Hill, who managed the bill on the floor of the Senate, said, "The question in this instance is whether those who enjoy the fruits and the benefits of the unions should make a fair contribution to the support of the unions." 96 Cong. Rec., Pt. 12, p. 16279 (quoted in *Hanson*,

supra, 351 U.S., at 231). Since the strike began TWA's "working" flight attendants have enjoyed neither the "fruits" nor the "benefits" of IFFA's representation. There is absolutely no reason to require them to financially support their adversary's efforts to destroy them. Under the facts of this case, enforcement of the 1981-84 union security agreement is totally inappropriate.

B. Union security agreements under the Railway Labor Act should be construed in the same manner as union security agreements under the National Labor Relations Act.

Although the Court "has emphasized that the NLRA cannot be imported wholesale into the railway labor arena," *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 394 (1969), "[t]he Court has in the past referred to the NLRA for assistance in construing the Railway Labor Act" while noting that "even rough analogies must be drawn circumspectly, with due regard for the many differences between the statutory schemes." *Id.*, at 394 (citations omitted). It is respectfully submitted that NLRA precedents would be very helpful in this case, especially in view of the fact that Congress, in enacting Section 2 Eleventh, specifically patterned it after the union security provisions of Section 8(a)(3) of the NLRA. S. REP. NO. 2262, 81st Cong., 2d Sess. 3 (1950).

In the case at bar, the major issue between the respondent union and the carrier was whether the union security provision of the 1981-84 TWA/IFFA agreement remained in effect. TWA took the position that the entire agreement, including the union security provision, expired by its own terms when the Section 6 notices were

served. *A fortiori* it would have been unlawful for it to enforce the union security provision when the parties were released to "self-help" following the expiration of the status quo and cooling-off periods. The union took the position that the agreement had not expired and that, even if it had expired, the union security clause remained in effect because it had been neither the subject of a Section 6 notice nor bargaining to impasse.

The court below found it unnecessary to address the issue of contract expiration and held that those portions of a collective bargaining agreement which had not been the subject of a Section 6 notice and negotiations remained in effect. In its view any other construction of the Act would completely undermine collective bargaining and allow carriers, such as TWA, to "flout the entire purpose of the RLA by not filing a [S]ection 6 notice with regard to certain changes it intends to make." (Cert. Pet. 18a). Accordingly, the court below held that the "working" flight attendants had to comply with the union security provision of the 1981-84 agreement or lose their jobs. It is respectfully submitted that the court below erred because it failed to take into account the differences between union security provisions and other provisions normally found in a collective bargaining agreement. The simple fact is that union security agreements, because they are restrictions of employee freedom, are treated differently from other terms and conditions of employment. A review of the NLRA precedents makes this distinction quite clear.

Under the NLRA, an employer breaches its duty to bargain in good faith when it makes a unilateral change in terms and conditions of employment without having first bargained to impasse with the union. This is true

even after the expiration of the collective bargaining agreement. *NLRB v. Cauthorne*, 691 F.2d 1023, 1025 (D.C. Cir. 1982); *see NLRB v. Katz*, 369 U.S. 736, 743 (1962). Thus provisions of an expired collective bargaining agreement that relate to mandatory subjects of bargaining and which have not been subjected to bargaining are said to survive the agreement's expiration. *Southwestern Steel & Supply, Inc. v. NLRB*, 806 F.2d 1111, 1113 (D.C. Cir. 1986); *NLRB v. Haberman Construction Co.*, 618 F.2d 288, 302 (5th Cir. 1980). This is the general rule, and the decision of the court below is consistent with its rationale. Also, the application of this general rule or principle prevents employers or carriers from flouting the bargaining processes of the federal labor statutes.

However, like any general rule there are exceptions, and it is respectfully submitted that the court below erred in failing to note that under the NLRA precedents, union security agreements fall within an exception to the general rule. The NLRB and the courts have consistently held that union security agreements (as well as dues checkoff agreements) are statutorily dependent upon the existence of the underlying collective bargaining agreement and cannot be enforced after its expiration. *Southwestern Steel*, *supra*, 806 F.2d at 1114; *Haberman*, *supra*, 618 F.2d at 302 n.16. Since the statutory language of Section 2 Eleventh is based on similar language contained in the NLRA, it is appropriate that the statutes receive similar constructions. Thus, if the TWA/IFFA agreement terminated upon the service of the Section 6 notices,[8] then *a fortiori* the union security provisions of

[8] The court below never decided whether the underlying collective bargaining agreement had been terminated. It based its decision solely on whether the union security clause—which was not the subject of reopening—had been terminated.

that agreement became unenforceable after the expiration of the status quo and cooling-off periods. Under the NLRA precedents, this is true even though other sections of the 1981-84 collective bargaining agreement might have survived the expiration of the contract. Union security agreements have a special status under the statutes and they should be narrowly construed. This is especially true during a hiatus between contracts when it is quite likely that the individual employees will become embroiled in a labor dispute.

It is respectfully submitted that the court below erred in not following NLRB precedents holding that union security provisions become unenforceable when there is a hiatus between contracts.

C. Enforcement of a union security agreement under the facts of this case is fundamentally unfair and inequitable.

Both during and after the strike, the respondent union used all of its economic power to try and bring TWA to its knees. It has taken out full-page ads requesting travelers to boycott TWA; it is currently trying to convince the Catholic Church to reverse its decision to utilize TWA for the upcoming Papal visit. While its activities are not impermissible, they are certainly not the type of activities which nonunion employees may be compelled to financially support. Similarly, the respondent union is currently using the monies being coerced from the "working" flight attendants to fund its litigation against those same flight attendants and TWA.

It is respectfully submitted that, as a matter of equity, the Court should not construe Section 2 Eleventh to

condone compulsory financial support of union activities which are so clearly detrimental to interests of those subject to the compulsory unionism provision. Where there is a deep schism within the bargaining unit, as in this case, the bargaining representative will undoubtedly have a serious conflict of interest with a large segment of the bargaining unit. Under those circumstances, the union should not be allowed to enforce a union security agreement to the detriment of many of the very people it represents.

It is respectfully submitted that following a bitter labor dispute like the TWA strike, where the employees have had to choose whether to support management or the union, enforcement of a union security agreement, if one is in effect, neither improves labor-management relations nor furthers national labor policy. As a matter of equity, the Court should leave the parties where they were at the end of the strike and allow them to ultimately solve their own problems—without compulsion or interference by the federal government.

CONCLUSION

For the above stated reasons, as well as those contained in petitioner's brief, the decisions below should be reversed.

Respectfully submitted,

ROBERT F. GORE, Esquire
ROSSIE D. ALSTON, JR., Esquire
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510
Counsel for Some Working Flight Attendants

Of Counsel:

REX H. REED, Esquire
National Right to Work Legal Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160

August 13, 1987

AMICUS CURIAE

BRIEF

OCT 5 1987

No. 86-1650

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

TRANS WORLD AIRLINES, INC.,
Petitioner,
v.
THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE RAILWAY LABOR EXECUTIVES ASSOCIATION AS AMICI CURIAE IN SUPPORT OF RESPONDENT

MARSHA BERZON
177 Post Street
San Francisco, CA 94108

WILLIAM MAHONEY
JOHN CLARKE, JR.
1050 17th Street, N.W.
Washington, D.C. 20036

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20036
(202) 637-5390

Of Counsel:
DANIEL SHERRICK
8000 East Jefferson Avenue
Detroit, MI 48214

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1650

TRANS WORLD AIRLINES, INC.,
Petitioner,

v.

THE INDEPENDENT FEDERATION OF
FLIGHT ATTENDANTS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE RAILWAY LABOR EXECUTIVES ASSOCIATION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE IN SUPPORT OF RESPONDENT

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") and the Railway Labor Executives Association ("RLEA") move for leave to file the attached brief *amici curiae* in support of the respondent. The petitioner, Trans World Airlines, Inc., has refused its consent to the filing of said brief. In support of this motion the AFL-CIO and RLEA state as follows:

1. The AFL-CIO is a federation of 89 national and international unions representing over 13,000,000 working men and women, and including the majority of the unions acting as exclusive bargaining representatives under the Railway Labor Act.

2. The RLEA is an unincorporated association, headquartered in Washington, D.C., whose membership consists of all the railway labor unions in the country, representing all of the crafts of railroad employees.

3. This case involves basic issues concerning the collective bargaining process under the Railway Labor Act. The parties to this case are in one of the two major industries covered by that Act, the airline industry, and, not surprisingly, approach the issues before the Court from the perspective of that industry.

As we recount in the attached brief, however, the RLA was actually written by and for the railroad industry, the other major industry covered by the Act. And, the railroad industry's collective bargaining structure was entirely in place before the airlines were covered by the Act and, indeed, before a single airline collective bargaining agreement had been negotiated. For that reason, it is particularly important in deciding this case to have a clear understanding of the railroad industry practice touching upon the issues presented here. Moreover, the law regarding the nature of collective bargaining and the obligations imposed on parties to the bargaining process has, in large part, been made, not under the RLA, under the National Labor Relations Act, as amended. While the lessons of one statute for the other must be drawn with care, a correct understanding of the relevant NLRA precedents is an essential precondition to sound decision-making in this case. The attached brief seeks to provide these wider perspectives on the issues presented here.

4. To carry out that aim, in the attached brief we first look at the more general of the two arguments made by the employer: *viz.*, an RLA employer may propose a limited change in the governing rules and, then, after the lengthy negotiation and mediation period mandated by the Act has been completed, unilaterally and permanently change, without bargaining at all, any rates of pay, rules, and working conditions whatever. This proposition, as we demonstrate in Part I of the attached brief, is basically in conflict with the RLA's emphasis on reaching consensual agreements and is in conflict, presumably for that reason, with the long-established patterns in the railway industry and with the general understanding of the bargaining process.

In Part II of the attached brief, we address the carriers' second, more limited argument: *viz.*, it is at least true under § 2, Eleventh of the RLA, that a voluntary agreement rather than a statutory obligation to carry forward previously-negotiated working conditions until the bargaining processes have run their course is a *sina quo non* for the validity of union security and dues checkoff requirements. As we demonstrate, the purpose of mandating, in § 2, Eleventh, permission to "make agreements" covering union security and dues checkoff was that such working conditions, if unilaterally established, raise company-union problems and violate the RLA. There is, on the other hand, no indication that the framers of the Act intended that once initially made, an agreement covering union security and dues checkoff is exempt from the Act's general requirements concerning changes in agreements already negotiated; indeed, the evidnce is to the contrary.

There is, however, as we also show in Part II of the attached brief, no need finally to address this statutory question. For, once again taking the railway industry background into account, it becomes clear that, absent some convincing basis for believing otherwise, agreements negotiated under the RLA should *not* be read as terminating in their entirety upon the indication of a

desire to change one or more of the contractual provisions. To the contrary, such agreements are ordinarily intended only to allow for the altering of whatever working conditions are noticed for change as provided by the Act. And, as both courts below held, the agreement in this case, which at best leaves to inference the consequences of a limited notice of intended changes, certainly does not provide in anything like plain terms for total evaporation of the agreement where modification is sought.

CONCLUSION

For the above-stated reasons, this motion for leave to file a brief *amici curiae* should be granted.

Respectfully submitted,

MARSHA BERZON
177 Post Street
San Francisco, CA 94108

WILLIAM MAHONEY
JOHN CLARKE, JR.
1050 17th Street, N.W.
Washington, D.C. 20036

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20036
(202) 637-5390

Of Counsel:

DANIEL SHERRICK
8000 East Jefferson Avenue
Detroit, MI 48214

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION AND SUMMARY OF ARGUMENT	2
I. As A General Matter, The Railway Labor Act Permits A Unilateral Change in Contractually-Established Working Conditions Only As a Last Resort, After The Parties Have Sought To Reach Accord As to That Change, Using the Statutory Dispute Settlement Mechanisms, And Failed To Do So	5
II. Because the Agreement in This Case Does Not Clearly Evidence An Intent By the Parties to Cancel the Entire Agreement When § 6 Notices are Filed Concerning One or More Working Conditions, the Agreement's Union Security and Dues Check-off Provisions Which Were Not Subject To Such Notices Remained In Effect	18
CONCLUSION	27

TABLE OF AUTHORITIES

Cases:	Page
Air Cargo, Inc. v. Teamsters Local 851, 733 F.2d 241 (2d Cir., 1984)	24
Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1969)	*passim*
Brotherhood of Railway and Steamship Clerks v. Florida East Coast Ry., 384 U.S. 238 (1966)	13, 14, 18
Burlington Northern Railroad Co. v. Brotherhood of Maintenance of Way Employees, —— U.S. ——, 107 S. Ct. 1841 (1987)	16
Chicago & Northwestern Ry. Co. v. United Transportation Union, 402 U.S. 570 (1971)	*passim*
Communications Workers v. Beck, No. 86-637	21
Detroit and Toledo Shore Line R.R. v. United Transportation Union, 396 U.S. 142 (1969)	10
Elgin, J. & E.R. Co. v. Burley, 325 U.S. 711 (1945)	16
Fall River Dyeing & Finishing Co. v. NLRB, —— U.S. ——, 107 S. Ct. 2225 (1987)	20
Felter v. Southern Pacific Co., 359 U.S. 326 (1959)	21
Inta-Roto, Inc., 252 NLRB 764 (1980)	21
International Association of Machinists v. Central Airlines, 372 U.S. 682 (1963)	16
International Association of Machinists v. Street, 367 U.S. 740 (1961)	20
KCW Furniture, Inc. v. NLRB, 634 F.2d 436 (9th Cir. 1980)	25
Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956)	23, 24
Metropolitan Edison Co. v. NLRB, 460 U.S. 693 (1983)	23
NLRB v. Crompton-Highland Mills, 337 U.S. 217 (1949)	9
NLRB v. Katz, 369 U.S. 736 (1962)	9
NLRB v. Lion Oil Co., 352 U.S. 282 (1957)	25
Order of Ry. Telegraphers v. Chicago & N.W. R. Co., 362 U.S. 330 (1960)	24
Taft Broadcasting Corp., 163 NLRB 475 (1967)	9
Trico Products, 238 NLRB 1306 (1978)	25

TABLE OF AUTHORITIES—Continued

Statutes:	Page
National Labor Relations Act, as amended, 29 U.S.C. §§ 141 *et seq.*:	
§ 8(a)(3), 29 U.S.C. § 158(a)(3)	4, 19, 21
§ 8(d), 29 U.S.C. § 158(d)	6
Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*:	
§ 2, First, 45 U.S.C. § 152, First	*passim*
§ 2, Fourth, 45 U.S.C. § 152, Fourth	20
§ 2, Fifth, 45 U.S.C. § 152, Fifth	20
§ 2, Sixth, 45 U.S.C. § 152, Sixth	23
§ 2, Seventh, 45 U.S.C. § 152, Seventh	11, 12
§ 2, Eleventh, 45 U.S.C. § 152, Eleventh	*passim*
§ 6, 45 U.S.C. § 156	*passim*
Ohter Authorities:	
Hearings on H.R. 7650, House Committee on Interstate and Foreign Commerce, 73r Cong., 2d Sess. (1934)	20, 26
H. Lustgarten, *Principles of Railroad and Airline Labor Law* (1984)	15, 18
National Labor Relations Board, *Written Trade Agreements in Collective Bargaining* (1939)	15
H. Rep. No. 2243, 74th Cong., 2d Sess. (1936)	16
S. Rep. No. 2262, 81st Cong., 2d Sess. (1950)	20, 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1650

TRANS WORLD AIRLINES, INC.,
Petitioner,

v.

THE INDEPENDENT FEDERATION OF
FLIGHT ATTENDANTS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE RAILWAY LABOR EXECUTIVES ASSOCIATION AS AMICI CURIAE IN SUPPORT OF RESPONDENT

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") and the Railway Labor Executives Association ("RLEA") submit this brief *amici curiae* contingent upon the granting of the foregoing motion for leave to file said brief. The interest of the *amici curiae* is stated in the motion.

INTRODUCTION AND SUMMARY OF ARGUMENT

Trans World Airlines ("TWA"), the employer in this case, puts forward two basic propositions in support of its position, one exceedingly broad and one relatively narrow. The sweeping thesis is that there is *nothing* in the Railway Labor Act ("RLA") that prevents an employer from unilaterally altering *any* rate of pay, rule or working condition, and from doing so *without* conferring with the union representing the affected employees and *without* using the statutory mechanisms for resolving disputes, as long as the statutory mechanisms have been exhausted with respect to at least *one* proposed change. Brief for Petitioner ("Pet. Br.") at 30 et seq. The second, more limited, proposition is that the RLA accords employers this right to act unilaterally with respect to *two particular kinds of working conditions: viz.*, the requirement that employees, as a condition of employment, are to pay dues to the exclusive bargaining representative, along with the associated commitment by the carrier to deduct those required payments from the wages of those employees who consent to such deductions.

Cutting across both of these arguments is the assertion that this case must be decided upon the premise that as of July 31, 1984 there were no longer in any sense agreed-upon working conditions regulating the relationship between the employer and its employees. The basis for this assertion is Article 28 of the collective bargaining agreement, which reads as follows:

> Except as otherwise specified in this Agreement, this entire Agreement shall be effective August 1, 1981 shall remain in effect until July 31, 1984, and thereafter shall renew itself without change for yearly periods unless written notice of intended change is served in accordance with Section 6, Title 1 of the Railway Labor Act, as amended, by either party hereto, at least 90 days prior to the renewal date in each year. [Pet. App. 78a.]

Both courts below, however, reading this provision against the background of the statute under which it was negotiated, concluded that the provision simply suspends the parties right to seek changes in the governing agreement during the period ending July 31, 1984 and if no changes were sought then, during the period ending July 31, 1985, and so on, while leaving in effect the agreed-upon rates of pay, rules, and working conditions which neither party has proposed to change in the specified manner.

As we show in Part I, *infra*, the RLA's language, structure, purpose and history, as well as the consistent interpretation given to the Act by this Court, allow a carrier to alter a contractually-established working condition *only* after notice to the union of a desire to alter *that* working condition and exhaustion, with respect to *that* working condition, of the statutory mechanisms designed to foster agreement rather than discord. This is true if the parties have not provided at all in their agreement for the possibility of altering its terms, and it is true as well if the parties have purported to provide for an agreement of limited duration.

In other words, we submit that *Congress in the RLA has prescribed a uniform mechanism for altering working conditions once those conditions are agreed upon by a carrier and a union.* Whether this conclusion is expressed in terms of a statutory obligation upon the parties to maintain the status quo, followed by a statutory right to alter the status quo after exhausting the stautory negotiation processes, or in terms of a statutory ban on contractual provisions permitting employers to act unilaterally without exhausting the RLA's negotiation processes is immaterial with respect to most working conditions thus carried forward. As a practical matter, the obligation placed upon the parties, as well as the privilege to change contractually-established working conditions if the statutory mechanisms fail to produce an

accord, are the same in either event. Thus, as we see this case, the question concerning the meaning of Article 28 of the collective bargaining agreement is of no moment with respect to the employer's broader argument.

The employer's second, more limited argument, however, does turn on the proposition that union security and dues check-off provisions in RLA agreements are *sui generis* and that "RLA Section 2 Eleventh . . . conditions compulsory union membership, and dues check-off, on the existence of a voluntary and subsisting labor contract." Pet. Br. 19. As we show in Part IIA, *infra*, this thesis is even in its own terms a dubious one: The language of § 2, Eleventh, as well as its history, do demonstrate that any such provisions must, as an *initial* matter, be agreed to by the carrier and the union. But the primary purpose of the agreement requirement is to preclude unilateral imposition of union security conditions by carriers because of the possibility of furthering the interests of company unions implicit in allowing a carrier to act on its own in that regard. Once there has been agreement between a carrier and a union in the first instance concerning union security and dues checkoff, neither the statute's history nor its language indicate that the agreement thus made is exempt, or can be exempted by the parties, from the RLA's general requirements governing contract changes. Indeed, TWA to a degree so recognizes, by conceding in its brief, as the employer did by its actions, that union security and dues check-off arrangements remain in effect, without regard to the status of the parties' contract, while the statutory mechanism for conferring and mediating proposed changes unrelated to the union security provision are going forward. Pet. Br. at 22.

There is no need in this case, however, to determine this statutory issue concerning the meaning of § 2, Eleventh, an issue which may have implications as well for the application of the union security provisions of § 8(a)

(3) of the National Labor Relations Act, as amended ("NLRA"). Rather, as we show in Part IIB, *infra*, it is at least true that given the RLA's overall statutory scheme, and the assumptions and purposes of its framers, the parties' agreement settling a particular matter—whether union security or any other—should be read to lapse automatically and without any notice, negotiations, or mediations upon the desireability of eliminating or changing that particular working condition *only upon the clearest indication that this was the parties' intent.* And, as we show, finally, in Part IIIC, *infra*, the duration clause in this case—which says nothing about the agreement as a whole terminating or expiring, and which is most sensibly read as simply freezing the contractually-established working conditions in place for the specified time periods—certainly does not meet this test.

I. As A General Matter, The Railway Labor Act Permits A Unilateral Change in Contractually-Established Working Conditions Only As a Last Resort. After The Parties Have Sought To Reach Accord As To That Change Through the Statutory Dispute Settlement Mechanisms, And Failed To Do So.

The Railway Labor Act is centered on a complex of provisions establishing a procedure through which disputes between employers and unions in the covered industries may be settled peaceably. First, and for present purposes perhaps most important, at the heart of the Railway Labor Act is the duty, imposed by § 2, First upon management and labor, "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes . . . in order to avoid any interruption to commerce or to the operation of the carrier growing out of any dispute between the carrier and the employees thereof." *Brotherhood of Railway Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377-78 (1969).

That requirement is analogous to, albeit more exacting than, the duty to bargain in good faith under the National Labor Relations Act, as amended ("NLRA"). In both instances, the statutory bargaining obligation rests on the recognition that "the bargaining status of a union can be destroyed by [an employer] going through the motions of negotiating almost as easily as by bluntly withholding recognition." *Chicago & Northwestern Ry. Co. v. United Transportation Union*, 402 U.S. 570, 575 (1971).

The RLA, in contrast to the NLRA, adds to the general good faith bargaining obligation "a detailed framework to facilitate the voluntary settlement of major disputes":

> A party desiring to effect a change of rates of pay, rules, or working conditions must give advance written notice. § 6. The parties must confer, § 2, Second, and if conference fails to resolve the dispute, either or both may invoke the services of the National Mediation Board, which may also proffer its services *sua sponte* if it finds a labor emergency to exist. § 5, First. If mediation fails, the Board must endeavor to induce the parties to submit the controversy to binding arbitration, which can take place, however, only if both consent. §§ 5, First, 7. If arbitration is rejected and the dispute threatens "substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation services, the Mediation Board shall notify the President," who may create an emergency board to investigate and report on the dispute. § 10. [*Trainmen v. Jacksonville Terminal*, *supra*, 394 U.S. at 378.] [1]

[1] Section 8(d) of the NLRA does flesh out the NLRA obligation to bargain collectively but to a far lesser degree. While § 8(d) does require written notice of a desire to "terminate or modify" an existing agreement, if that notice is timely given there is no explicit NLRA obligation to maintain the status quo beyond the termination or modification date set in the agreement, nor is any government agency empowered to determine as a precondition to the use of self help measures when the parties have satisfied their bargaining obligations.

And "while the dispute is working its way through these stages, neither party may unilaterally alter the *status quo*. §§ 2, Seventh, 5, First, 6, 10." *Id.* "Implicit in the statutory scheme [moreover] . . . is the ultimate right of the disputants to resort to self-help—the inevitable alternative in a statutory scheme which deliberately denies the final power to compel arbitration." *Id.* Because the RLA is silent as to the "scope of allowable self-help" (*id.* at 391), this Court has concluded that "parties who have unsuccessfully exhausted the Railway Labor Act's procedures for resolution of a major dispute [are allowed] to employ the full range of whatever peaceful economic power they can muster, *so long as its use conflicts with no other obligation imposed by federal law*," (*id.* at 392 (emphasis supplied)).

TWA would have it that as far as the RLA is concerned—and absent any contractual limitation to the contrary—a carrier is free once the self-help period is reached to change *any* rates of pay, rules, or working conditions, *including those as to which no notice of intended change was issued and no bargaining took place.*[2] In other words, a carrier could present for bargaining through a § 6 notice a single, limited proposal altering one working condition provided for in the collective bargaining agreement and if the union refused to agree to the proposal, and the Act's procedures were exhausted as

[2] In other words, although TWA's brief sometimes obscures this point (*e.g.* Pet. Br. 40), TWA's claim is not simply that the employer is entitled to change working conditions during the course of a *strike* by the union, but that the employer is entitled to put such changes in place whether or not the union strikes, to keep those changed working conditions in place indefinitely, and to maintain those conditions unless and until the employer agrees to the contrary with the union.

to the proposal, the union would have nothing to say about any other working conditions the employer might choose unilaterally to institute.

The direct result of TWA's theory would be the imposition upon the employees in the bargaining unit of rates of pay, rules, and working conditions by management fiat, rather than through the consensual processes visualized by the RLA. A concommitant effect would be to create a strong incentive for carriers *not* to reach agreement upon whatever limited proposals the carrier has put forward, since the prize for *not* reaching agreement would be general freedom to change working conditions without treating with the union. And the further, inevitable consequence of this approach would be derogation of the union as the employees' bargaining representative "almost as easily as by bluntly withholding recognition." *Chicago & Northwestern Ry. Co., supra*, 402 U.S. at 575.

Not surprisinglly, nothing in the RLA's purposes, structure, language, history, or prior construction supports TWA's position.

1. First, and independently dispositive upon this aspect of the case, TWA's vision of the statutory scheme is fundamentally at odds with the RLA's most basic statutory purpose: that carriers and unions "exert every reasonable effort to make and maintain ageements." Section 2, First.[3]

It is plain on the face of the matter that an employer who imposes by unilateral fiat working conditions which the union was never given any opportunity to comment on, or make counter proposals to, is hardly "exert[ing] every reasonable effort" to reach agreement with the

[3] Section 2, First states an independently enforceable obligation under the RLA to negotiate with regard to rates of pay, rules, and working conditions generally, without regard to whether there is a prior or existing agreement concerning those rates, rules and conditions. *Chicago & Northwestern Ry. Co., supra*, 402 U.S. at 577.

union upon those conditions. This Court has therefore recognized that there is a fundamental incompatibility between an obligation to engage in good faith bargaining with a union and the act of unilaterally imposing upon bargaining unit employees a wage or term of employment not first presented to the exclusive representative for consideration at the bargaining table. *NLRB v. Compton-Highland Mills*, 337 U.S. 217, 223-25 (1949); *NLRB v. Katz*, 369 U.S. 736 (1962). As the Court stated in *Katz*:

> Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy. It will often disclose an unwillingness to agree with the union. It will rarely be justified by any reason of substance. [367 U.S. at 747.]

The National Labor Relations Board with the approval of this Court has recognized that this principle is of sufficient weight to support an implicit, albeit limited, status quo requirement even in the NLRA which, unlike the RLA, does not expressly require that working conditons must be maintained while the bargaining process goes forward. *Katz, supra*; *Taft Broadcasting Corp.*, 163 NLRB 475, 478 (1967) (working conditions may be changed only "after bargaining to an impasse, that is, after good faith negotiations have exhausted the prospects of concluding an agreement," and then only "by making unilateral changes that are reasonably comprehended within [the] pre-impasse proposals").

On the same basis, this Court has previously noted that apart from the more explicit status quo requirements in the RLA, there is, as well, an "implicit status quo requirement" in the obligation imposed upon both parties by § 2 First, "to exert every reasonable effort to settle disputes without interruption to interstate commerce."

Detroit and Toledo Shore Line RR v. United Transportation Union, 396 U.S. 142, 151 (1969). *See Chicago & Northwestern Ry. Co., supra*, 402 U.S. at 575 (a court is empowered to enjoin a strike, as inconsistent with a union's obligation under § 2, First even after the statutory processes are exhausted if the union did not fulfill its independent obligation to "make every effort to make and maintain agreements.")

Thus, one need go no further than the first, and most basic, substantive provision in the RLA in order to see that TWA may not unilaterally impose working conditions about which the employer failed to consult the union during the two-year consultation and mediation process that proceeded the "self-help" period in this case. This conclusion is buttressed, moreover, by the consideation that if the carrier presents in bargaining only certain of the changes in contractually-established working conditions that the carrier actually intends to instigate in the event no agreement is reached the carrier is intentionally withholding from the union the full picture of the controversy the union needs to formulate its own bargaining response. Indeed, by artificially limiting the range of issues on the bargaining table and therefore the range of tradeoffs available, the carrier hampers the ability of the parties to reach agreement on those matters which are concededly on the table. For these reasons as well, TWA's position here is fundamentally at odds with the "heart of the Railway Labor Act, the duty to make every effort to reach consensual solutions to workplace disputes." *Trainmen v. Jacksonville Terminal, supra*, 394 U.S. at 378.

2. Along with the principles outlined above that are implicit in § 2, First, the RLA's other provisions—which are part of "an integrated, harmonious scheme" (*Detroit and Toledo Shore Line RR, supra*, 396 U.S. at 152)—necessarily require that once a working condition has been agreed upon as a result of the Act's processes, that condition is subject to change only through use of those

mechanisms (or, if there is no agreement upon the proposed change after the statutory processes have been exhausted, then through self-help).

Section 6 of the Act requires that "[c]arriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting the rates of pay, rules, or working conditions"; § 2, Seventh mandates that "[n]o carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Title."

When the controversy that gave rise to this case began, TWA did issue notices of *certain* intended changes under § 6; but, as already noted, the employer did *not* notify the union of *all* the changes the employer intended to, and later did, make in the working conditions "embodied in" the parties' collective bargaining agreement. Thus, TWA quite literally violated § 2, Seventh of the Act, since the employer changed certain working conditions established by the agreement without giving the notices of changes the employer intended to make (at least contingently) in the working conditions established by the agreement, as required by § 6, and without following the statutory procedures that flow from issuance of such a notice.[4]

---

[4] The agreement in this case, far from purporting to suspend the otherwise applicable provisions of § 6 expressly requires that "written notice of intended change [be] served in accordance with Section 6, title I of the Railway Labor Act." The only modification worked by the agreement to the statutory requirement is to *add* to the minimum thirty day notice required by the statute an additional sixty-days notice, so that the total notice period became "at least 90 days prior to the renewal date in each year." There is therefore no reason in this case to consider whether parties may not only add to the procedures ordinarily imposed by the Act for making changes in working conditions embodied in a collective bargaining agreement in the manner plainly contemplated by § 6—which speaks of "at least thirty days" notice—but may also *subtract* from those negotiation procedures.

TWA's response to this point is a series of semantic quibbles which disregard the overall statutory scheme. For example, TWA contends that because § 6 requires notice only of "*an* intended change" (emphasis supplied), it is possible to comply with § 6 by issuing notice of only one of many changes that the carrier intends to make, and by exhausting the statutory consultation mechanisms with respect to that change alone. Pet. Br. at 40. Surely, the more sensible reading of the statutory language is that the requirements established by § 6 apply with respect to each and every intended change.

It is worth noting too—and this observation has force with respect to the whole of TWA's approach—that the employer's narrow understanding of § 6, of § 2 Seventh, and of the interaction between the two provisions would change the union's bargaining obligations as well as the carrier's. If carriers could satisfy the statutory requirements for serving notice of intended changes and utilizing the statutory conciliation machinery in the way TWA suggests, then no reason appears why unions could not also do so. This would mean that a union could inform the carrier of, and consult and mediate about, only certain of the changes in contractually-established working conditions that the union was ultimately interested in obtaining, putting other proposals forward only after the status quo period had expired and a strike was immediately permitted. Similarly, under TWA's approach, the union in this case could have waited until TWA issued its § 6 notice, contended (as TWA does now) that the working conditions contained in that agreement ceased to be of any force and effect on July 31, 1984 and claimed that the union had no obligation to issue any § 6 counterproposals of its own in order to protect its later right to strike because there were no longer any "agreements" in effect to change. As these examples illustrate, any such miserly reading of the statute would entirely undermine the obligation of carriers *and* unions to engage in

meaningful, good faith bargaining likely to result in consensual settlement of disputes.

These considerations cannot be overcome by TWA's repeated reliance on the "implicit . . . ultimate right of the disputants to resort to self-help" (*Trainmen v. Jacksonville Terminal, supra*, 394 U.S. at 378) after the various status quo periods have expired. Under the statutory scheme, the carrier is free to exercise self-help after the expiration of the status quo periods in the most obvious sense of that term: *viz.*, by helping itself, without the consent of the union—and *whether or not the prior contract purported to lapse upon the issuance of § 6 notices* —to the working condition sought but not obtained through the consensual processes. *Brotherhood of Railway and Steamship Clerks v. Florida East Coast Ry.*, 384 U.S. 238, 249 (1966) (White, J., dissenting on another point) ("once "bargaining was exhausted . . . on wages and notice of layoffs and job abolition . . . the union was free to strike and the carrier to make such change *as had been bargained for.*") The carrier is also free, of course, to counter any strike engaged in by the union by hiring replacement, as TWA did in this case. *Id.* at 245. And, as *Florida East Coast* also makes clear, in endeavoring to counter a strike through the hiring of replacements, the carrier is accorded a "strictly confined" power to make such alterations in previous working conditions as are "reasonably necessary" to enable the carrier to operate. *Id.* at 247-48.

Each of the rights just detailed is entirely consistant with the RLA's language, structure and purpose. Thus, there is no reason to suppose that it follows from that catalogue that the "self-help" implicitly contemplated by the statute also includes the right to flout the fundamental obligations imposed by § 2, First and by the RLA's "detailed framework to facilitate the voluntary settlement of major disputes," (*Trainmen v. Jacksonville Terminal, supra*, 394 U.S. at 378). TWA's suggestion

to the contrary ignores the critical caveat that the right to self-help ends where "its use conflicts with [another] obligation imposed by federal law." *Id.* at 392.[5]

3. In large part, the preceding discussion simply expands upon the description and explanation of the RLA's statutory scheme provided by this Court in *Florida East Coast Ry., supra.* The Court in that case recognized that as a general matter a carrier may *not* use the existence of an unresolved dispute over certain working conditions as to which the statutory mechanisms for conciliation have been exhausted "to make sweeping changes in its work-rules so as to permit operation on terms which could not conceivably have been obtained through negotiations." 384 U.S. at 247.[6] The Court there explained that any other view of the statute would undermine the carrier's incentive to reach agreement, making "[t]he processes of bargaining and mediation called for by the Act . . . a sham if the carrier could unilaterally achieve

[5] An example similar to one given earlier may help to clarify this point. The most usual form for "self-help" for unions is, of course, striking. Suppose, however, that under the very contract here at issue, the union had proposed a few limited changes, failed to reach agreement upon those changes using the Act's mechanisms, and then claimed the right to engage in the "self-help" of striking over a much broader range of subjects than it had placed on the bargaining table, refusing to return to work until the carrier agreed to its position as to those matters. For a union under these circumstances to proclaim that it may proceed in this fashion simply because the RLA protects its right to strike would obviously be unresponsive to the contention that the Act bans strikes except where the Act's consensual processes have been tried and failed with respect to the particular contractual terms the union is seeking obtain.

[6] The Court did recognize a "strictly confined" exception to that principle, applicable only during a strike (384 U.S. at 247 n.7) and only to the degree "reasonably necessary" to maintain operations during the strike (*id.* at 248). TWA apparently did not attempt to take advantage of this exception even during the period of the strike in this case.

what the Act requires be done by the other orderly procedures." *Id.*

TWA seeks to avoid the force of this controlling precedent by maintaining that while the language of both the majority and the dissenting opinions in *Florida East Coast Ry.* shows that its holding rests on the Court's reading of the RLA itself, in fact the decision rests on the Court's reading of the particular collective bargaining agreements that gave rise to the labor dispute in that case. According to TWA, those agreements "consisted of separate and independent 'Rules' . . . [and] provided that each Rule could be changed only after service of a Section 6 notice as to that particular Rule." Pet. Br. at 31 n.22.[7] And the conclusion TWA would draw is that since there is a single integrated collective bargaining agreement here, the rules stated in *Florida East Coast Ry.* do not apply. Even granting TWA its premise, the conclusion the employer would draw does not follow.

As this Court recently observed, the RLA is a statute that "cannot be appreciated apart from the environment out of which it came and the purposes it was designed to

[7] TWA's description of the usual bargaining pattern in the railroad industry appears to be generally accurate, with one exception:

> While railroad collective bargaining agreements do not have (and perhaps cannot have) specified termination dates, the major national agreements usually include moratorium clauses, which accomplish essentially the same purpose as a termination clause. The moratorium clauses normally provide that no new Section 6 notices can be served or progressed covering the specified issues resolved in that agreement for a state period, usually three years. This tends to assure that, once agreement is reached on such major items as wages and fringe benefits, there will be an agreed upon period of stability and peace before new negotiations can be initiated on those subjects. [H. Lustgarten, *Principles of Railroad and Airline Labor Law* (1984) at 54.]

See also National Labor Relations Board, *Written Trade Agreements in Collective Bargaining* (1939) at 115 et seq. ("Chapter VII, The Railway Industry").

serve." *Burlington Northern Railroad Co. v. Brotherhood of Maintenance of Way Employees*, —— U.S. ——, 107 S. Ct. 1841, 1850 (1987), *quoting Elgin, J. & E.R. Co. v. Burley*, 325 U.S. 711, 751 (91945) (Frankfurter, J., dissenting). In large part that is so because "the RLA was negotiated and agreed to by the railroads and the [unions], and is 'probably unique in having been frankly accepted as such by the President and Congress.'" *Burlington Northern*, 107 S. Ct. at 1852 n.13, *quoting Elgin, J. & E.R. Co.*, 325 U.S. at 753. Thus, consideration of the traditional pattern of collective bargaining agreements in the railroad industry and of the method of modifying those agreements offers helpful insight into the premises as to how the RLA was to operate in practice from which the Act's draftsmen began. Those premises are, of course, an authoritative guide to the RLA's correct interpretation.[8]

For example, because, in the railway industry, different working conditions are often covered by entirely separate agreements or are negotiated as independent "rules," the noticing of an intent to change individual working conditions, leaving in effect the remainder, is

[8] That this case arose in the airline industry in no way detracts from the pertinence of the railroad industry model as a key to the RLA's construction. For the statute Congress prescribed to govern labor relations in the "small-but-growing air transportation industry" in 1936 was not the National Labor Relations Act passed to govern employment relations in most of private industry the year before, but the Railway Labor Act. The "general aim [of the 1936 airline industry Act] was to extend to air carriers and their employees the same benefits and obligations available and applicable in the railroad industry." *International Association of Machinists v. Central Airlines*, 372 U.S. 682, 685 (1963). (Although there was one "significant variation" (*id.*) prescribed for the airlines, that variation is in no way pertinent here.) Indeed, the 1936 enactment could hardly have reflected any conception of the patterns of collective bargaining in the airline industry since, at the time the 1936 statute was enacted, *there were no collective agreements in existence in the fledgling industry*. H. Rep. No. 2243, 74th Cong. 2d Sess. (1936) at 1.

regarded as the norm, and not the exception.[9] Read against this background, it is extraordinarily unlikely that Congress intended in § 6 to permit carriers (or unions) to open up an entire collective bargaining agreement containing many proviisons governing many different working conditions for unilateral changes during the self-help period by noticing for change *only* one or a few working conditions. And read against this background, there is absolutely nothing "incongruous" (Pet. Br. at 40) about providing that contractual provisions will continue in effect with respect to those matters neither party affirmatively indicates a desire to change, while permitting self-help after exhaustion of the statutory conciliation mechanisms with respect to those working conditions concededly in dispute. Indeed, that approach follows directly from the needs of the basic labor relations structure in the basic industry covered by the RLA and furthers the interest in stability that is the hallmark of the Act.

Moreover, while TWA may regard it as "a useless exercise" to give the union notice and the right to bargain about the full range of changes in working conditions that the carrier wishes to implement in the event conciliation breaks down (Pet. Br. at 40), that practice is common in the railroad industry:

> While any party is entitled to initiate changes in the agreement through the service of a Section 6 notice, such notices are usually served first by the unions. Once the unions have served notice, however, the carriers may, and often do, serve counter notices designed to raise new bargaining issues or to bring

[9] There is, of course, a necessary symbiosis between a statutory scheme and the prevailing contractual arrangements under the statute that make it difficult—indeed unavailing—to attempt to separate cause and effect. Thus, it may be that the original patterns of agreement have persisted in the railroad industry because of the needs and customs of the industry, or because of the RLA's legal demands.

> into the negotiations matters which they may wish to use as trading material as possible offsets to the union demands. In national negotiations on railroad wages and benefits, the carriers always serve written counter-demands, which usually include counter requests for changes in operating rules and almost always include a series of rather drastic proposals which are designed to be put into effect should the unions ultimately strike over their own proposals. [H. Lustgarten, *supra*, at 55.]

And equally to the point that practice, as we have emphasized, far from being useless, serves the statutory purposes of promoting voluntary agreements by assuring that parties bargain with a full awareness of the risks of non-agreement, as well as a keen appreciation of the scope of compromises possible.

In sum, *as a matter of statute*, the RLA mandates that, with the very narrow exception enunciated in *Florida East Coast Ry.*, both carriers and unions must place on the bargaining table, and process through the full panoply of statutory conciliation machinery, the specific proposals with respect to the particular contractually-established working conditions the parties wish to see changed. Only if that requirement is met may the party making the proposal engage in self help with regard to the working conditions covered by the proposal should agreement prove impossible.

II. Because the Agreement in This Case Does Not Clearly Evidence An Intent By the Parties To Cancel the Entire Agreement When § 6 Notices are Filed Concerning One or More Working Conditions, the Agreement's Union Security and Dues Check-off Provisions Which Were Not Subject To Such Notices Remained In Effect.

A. According to TWA, the foregoing analysis is simply irrelevant with regard to the narrower issue before this Court, because the two particular kinds of working conditions directly at issue in this case—a union security provision and a dues checkoff provision—are both valid,

as a matter of statute, only if incorporated in a voluntary, currently valid collective bargaining agreement. When such contractual provisions lapse by their terms, says TWA, there is no requirement to maintain the status quo while seeking a change through the RLA's negotiation processes. The purported sources for thus suspending the statutory mechanism for altering contractually-based working conditions are two: First, it is said that § 2, Eleventh, authorizing union shop agreements and dues checkoff provisions, by its language and history, evidences Congress' intent to create such an exception. And second, it is maintained that because § 2, Eleventh was modelled to some degree upon § 8(a)(3) of the NLRA, the NLRB's holdings under the latter statute that union security and dues checkoff provisions are among the exceptions to the unilateral change prohibition implicit in the NLRA duty to bargain (*see* pp. 8-9, *infra*) should apply as well to the purportedly analogous situation under the RLA.

The first contention is without a basis in the statute. Section 2, Eleventh, in terms, simply permits carriers and unions "to make agreements" of specified kinds requiring the financial support of the exclusive bargaining representative as a condition of employment, and allowing employees to authorize deduction of dues payments from their paychecks. The reason this special permission to enter into agreements is necessary is that two earlier-enacted sections of the RLA made it illegal for employers unilaterally to

> influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fess, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions,

or to

> require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization. . . . [RLA §§ 2, Fourth & Fifth.] [10]

Sections 2, Fourth & Fifth, in turn, were enacted in 1934—*at the behest of the RLA labor organizations*—"in order to reach the problem of company control over unions." S. Rep. No. 2262, 81st Cong., 2d Sess. (1950) at 2. *See generally Hearings on H.R. 7650, House Committee on Interstate and Foreign Commerce*, 73d Cong., 2d Sess. (1934); *see also Street, supra*, 367 U.S. at 751-54.

Thus, the problem addressed by the "make agreements" language of § 2, Eleventh is that if carriers were free to unilaterally *initiate* union security and dues checkoff provisions that right could be an instrument for *employer* domination of unions.[11] These provisions are not aimed at, or even concerned with, protecting the employer's right to engage in self-help during strikes, as TWA intimates. Nor did Congress view the employer as a surrogate in the collective bargaining process for the interests of individual employees viz a viz the union. *Cf. Fall River Dyeing & Finishing Co. v. NLRB*, —— U.S. ——, 107 S. Ct. 2225, 2239 n.16 (1987).

Against this background, it is perverse to view § 2, Eleventh as an *exception* to the processes set up under the statute for facilitating agreement between unions and carriers, rather than as a confirmation that the processes ordinarily used to "make agreements" *should* apply. Indeed, the tidbits of legislative history upon which TWA relies (Pet. Br. at 21-22) actually indicate that Congress'

[10] The legislative history of § 2 Eleventh is recounted in detail in *International Association of Machinists v. Street*, 367 U.S. 740 (1961).

[11] For this reason, although it is hard to see that the situation would ever arise, an employer presumably could not unilaterally impose a union security or dues checkoff provision upon an unwilling union after exhaustion of the statutory bargaining mechanisms.

concern was precisely with assuring that union security and dues check-off clauses would be part of the usual collective bargaining process established by the statute, rather than that such clauses should constitute a *sui generis* exception to those process. *See, e.g.*, S. Rep. No. 2263, *supra*, at 2 (the bill permits the carriers and unions "through the voluntary process of collective bargaining" to include union security and dues checkoff provisions).

TWA is, however, partially correct in its second observation. The language and structure of § 2, Eleventh and § 8(a)(3) are generally analogous *with respect to the "make arrangements" provision* [12], and the NLRB has held that § 8(a)(3) does establish a collective bargaining agreement currently in force—as opposed to the statutorily imposed obligation to preserve the status quo as part of the bargaining process—as the *sine qua non* for the enforcability of union security and dues check-off requirements. Pet. Br. at 23-24. For the reasons already stated with regard to § 2, Eleventh, however, the propriety of this conclusion—which has never been reviewed in this Court—is highly debatable. Moreover, whatever expertise the NLRB may have with respect to construing its own statute does not carry over to the RLA, whose construction on questions such as this is committed to the courts. *Felter v. Southern Pacific Co.*, 359 U.S. 326, 327 n.3 (1959). Finally, while the union security and dues checkoff provisions of the RLA and the NLRA are for present purposes facially analogous, the statutory bargaining processes of the two statutes are *not*.

The main difference between the two statutes is that the NLRA does *not* impose any limitation upon the right of unions to strike in support of their bargaining demands once an agreement expires, while there *is* such a

[12] As TWA notes (Pet. Br. at 26 n.18), the distinctions between RLA § 2 Eleventh and NLRA § 8(a)(3) stressed by the union in *Communications Workers v. Beck*, No. 86-637, also pending before the Court this Term, are not relevant in this case.

limitation—for the entire, lengthy period of the explicit statutory status quo period—under the RLA. Thus, if the NLRB rule concerning the status of union security agreements applied with full force under the RLA, the situation would be that union security and dues checkoff provisions could be suspended for years at time, with the union completely disabled over that period from engaging in self-help in order to induce the employer to sign an agreement.

Perhaps in recognition that such a result has little in the way of equity or of promoting stable labor relations to recommend it, TWA avoids the logic of its position and concedes that union security and dues check-off provisions continue during the statutory status quo periods. Pet. Br. at 22. And, in fact, TWA abided by the union security and dues checkoff provisions through the status quo period here, unilaterally changing those provisions only when the statutory conciliation procedures had failed to yield an agreement. Yet, there appears to be no principled rationale for *suspending* any contract-based requirement that may be implicit in § 2, Eleventh during the statutory status quo period and for then *reinstating* that requirement with the advent of the self-help period.

The open question just discussed is one this Court may have to face sometime in the future. For present purposes, however, there is no need finally to determine the question whether § 2, Eleventh makes a current collective bargaining agreement, as opposed to the applicability of a statutory status quo requirement, the *sine qua non* for continuing union security and dues checkoff arrangements. The reason is that *absent some much clearer indication than the duration clause in this case provides*, agreements under the RLA may *not* be read as intended to terminate automatically and without invocation and exhaustion of the RLA negotiation processes.

B. As we demonstrated in Part I, the RLA requires that parties to collective bargaining agreements generally

must, in altering those agreements, adhere to the statutory conciliation and mediation requirements with respect to each particular change requested, and are free to engage in self-help with respect to a particular proposed change only after having done so. TWA, however, insists that the employer and the union agreed to the contrary here; according to the employer, the parties' contract terminated in its entirety once a notice of a single intended change issued, and, at least as a matter of contract, permitted the parties to freely alter the working conditions embodied in that agreement thereafter.

It is our contention, however, that the RLA's statutory scheme carries along with it the legal principle that parties contracting under the Act should be taken, absent some clear indication to the contrary, to intend a duration provision generally compatible with, rather than at odds with, the regime that is as a practical matter established by the statute.[13] It is axiomatic that "words

---

[13] For at least two reasons, we do not believe that the need to establish principles in this case for construing the duration clauses of collective bargaining agreements negotiated under the RLA makes the case into a minor dispute within the meaning of § 2 Sixth.

First, as we see the contract-related issue in this case, it is more akin to a question of statutory waiver than to a pure contract question. *Cf. Mastro Plastics v. NLRB*, 350 U.S. 270 (1956); *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983). As such, it is a question turning more upon statutory considerations than upon ones concerning contract law and does not "arise out of grievances or out of the interpretation or application of agreements" within the meaning of § 2 Sixth of the Act.

Second, there is indubitably in this case a major dispute; *viz.*, the continuing dispute between TWA and the union concerning the intended changes in working conditions proposed almost four years ago by the employer and never accepted by the union. The basic issue before this Court is whether the commands of the statute concerning the settling of major disputes are being complied with: TWA contends that it has a statutory right to engage in self-help which goes beyond the particular working conditions at stake in the original major dispute, while the union claims that

[in a contract must be] read in their context *and in light of the law under which the contract was made.*" *Mastro Plastics Corp v. NLRB*, 350 U.S. 270, 281 (1956). Since, as we have seen (pp. 16-18, *supra*), the framers of the RLA foresaw a regime in which agreements would generally be amended rather than terminated, and in which the parties would have to exhaust the statutory conciliation mechanism on a proposed change to a working condition in an effort to reach agreement before unilaterally changing that working condition, contracts negotiated under the RLA should be read so to provide where possible. Here, an interpretation consistent with that statutory vision is not only possible, but is the one reached unanimously by the four judges who heard this case below.[14]

First, nothing in the duration clause of this agreement expressly contemplates the termination or expiration of the agreement. Rather, the duration clause in terms provides for the indefinite duration of the agreement "unless written notice of intended change is served in accordance with Section 6, Title I of the Railway Labor Act as

---

TWA has no such right. While it may be necessary to consider a quasi-contractual issue in order to decide this case, the dispute remains a major one within the meaning of the Act and the legal question presented is for the courts to resolve. *Air Cargo, Inc. v. Teamsters Local 851*, 733 F.2d 241, 246-47 (2d Cir., 1984) (because the System Board entrusted with deciding minor disputes has no statutory jurisdiction over major disputes, that board has "no jurisdiction to determine the parties' obligations during such disputes"); *Order of Ry. Telegraphers v. Chicago & N.W. R. Co.*, 362 U.S. 330, 341 (1960); *see* H. Lustgarten, *supra*, at 151 (explaining that what was actually involved in *Order of Ry. Telegraphers* was the application of a moratorium clause in triggering a major dispute).

[14] This Court commented in *Mastro Plastics, supra*, that "unanimity of interpretation" by the various judges who have hear a case "is entitled to much weight." 350 U.S. at 357. As in *Mastro Plastics*, all of the decisionmakers in this case heretofore have agreed that the duration clause simply limits the times the agreement is open to amendment rather than providing for the complete expiration of the agreement.

amended. . . ." What happends if such "written notice of intended change *is* served in accordance with Section 6" is entirely left to inference. And, particularly given the express reference to the pertinent statutory section in the agreement, by far the most plausible inference is that the duration clause was intended—like § 6 itself—to provide for the alteration of a contractually-established term only after the bargaining and mediation regarding that condition required by the statute, and not unilaterally by the parties after a certain date.

This conclusion is reinforced by comparing the language of the duration clause in this case—which appears to be fairly typical of duration clauses in the airline industry [15]—with that in agreements negotiated under the NLRA. For example, in *NLRB v. Lion Oil Co.*, 352 U.S. 282 (1957), the relevant provision read:

> This agreement shall remain in full force and effect for the period beginning October 23, 1950, and ending October 23, 1951, and thereafter until *canceled* in the manner hereinafter in this Article provided. [352 U.S. at 333 (emphasis supplied).]

The agreement then went on to prescribe a cancellation procedure which provided, first, for a notice of amendment and, then, if no amendment was agreed upon, for a notice of "termination." *Id.* at 286. *See also, e.g., Trico Products*, 238 NLRB 1306 (1978); *KCW Furniture, Inc. v. NLRB*, 634 F.2d 436, 437 (9th Cir., 1980) (providing for a three year duration, annual automatic renewal, and separate notices of "opening" the agreement (for amendments) and for "termination"); *Intra- Roto, Inc.*, 252 NLRB 764, 765 (1980) (providing for notice of "desire to modify *or* terminate" (emphasis supplied)). These agreements all, first, expressly admit of the possibility of termination and, second, distinguish between

---

[15] *Compare, e.g.*, the duration clause in *Manning v. American Airlines*, 392 F.2d 32 (2d Cir.), *cert. denied*, 379 U.S. 817 (1964).

modification and termination (demonstrating in the later regard that collective bargaining agreements certainly can be, and many times are, modified without terminating the underlying agreement).

Agreements entered into under the RLA, unlike those negotiated under the NLRA, must account for the fact that, absent some express contract provison to the contrary, the parties are free to serve a § 6 notice at any time during the terms of a collective bargaining agreement. *Compare* RLA § 6 with NLRA § 8(d). In theory then the RLA opens the possibility of continuous collecitve bargaining with the instability such a regime would inevitably entail.

The result is that RLA contracts are characterized by "moratorium" clauses; *viz.* clauses that provide that during specified periods the parties are *not* free to serve § 6 notices. An example of such a moratorium clause is referred to in the Hearings that preceded the 1934 amendments to the RLA: When one railroad industry union official was asked, "how long does your contract run?", he answered, "Our contracts run for a period of a year, *and thereafter until either party desires to serve a 30-day notice on the other for a change.*" 1934 Hearings, *supra*, at 99. That description certainly comports with the general thrust of the duration provision in this case, and provides a more apt comparison than the NLRA contract clauses just discussed.

There is one additional consideration supporting the construction of the duration clause in this case reached by the two lower courts: The practice of the parties confirms that construction. For, during the status quo period in this case, TWA did *not* cancel the union security and dues check-off clauses, despite its contention that under § 2, Eleventh a union security clause is unenforceable absent an outstanding collective bargaining agreement. While TWA purports to recognize some statutory distinction for purposes of § 2, Eleventh, between the

status quo period and the self-help period, that distinction is, as noted previously (p. 22 *supra*), entirely implausible. A more likely explanation is that the carrier itself viewed the duration provision at that time as did the courts below thereafter.

In short, it is at least far from evident that the carrier and the union in this case entered into a collective bargaining agreement which is in fundamental tension with the agreement modification scheme of the labor statute under which the contract was negotiated. The far more plausible conclusion is that one reached by the two courts below: that while the agreement allowed the parties to propose modifications after three years and then annually, the *agreement continued in effect except as to those provisions upon which modification was sought.* Under that view of the agreement, there was a contract in effect with respect to the union security and dues checkoff arrangements at all relevant times, and TWA's unilateral abrogation of those working conditions was unlawful.

CONCLUSION

For the above-stated reasons, the judgment should be affirmed.

Respectfully submitted,

MARSHA BERZON
177 Post Street
San Francisco, CA 94108

WILLIAM MAHONEY
JOHN CLARKE, JR.
1050 17th Street, N.W.
Washington, D.C. 20036

Of Counsel:

DANIEL SHERRICK
8000 East Jefferson Avenue
Detroit, MI 48214

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20036
(202) 637-5390